42nd Annual Probate Practice Seminar

OCTOBER 6, 2023

Trumbull County Probate Court

Judge James A. Fredericka

Robins Theatre
160 East Market Street
Warren, Ohio 44481

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Agenda

7:30 a.m. - 8:00 a.m. Check-in

8:00 a.m. - 9:00 a.m.
Magistrate John T. Shorts
Magistrate Christopher J. Schiavone
Magistrate Emily Clark Weston
Trumbull County Probate Court
Probate Updates

9:00 a.m. - 9:15 a.m. ***Break***

9:15 a.m. - 10:30 a.m.
R. Hugh Magill
President, Granite River Consulting, LLC
Wealth Planning for a Brave New World: It's All in the Family… What's a Family?

10:30 a.m. - 10:45 a.m. ***Refreshment Break***

10:45 a.m. - 11:45 a.m.
Adam Fried, Esq.
Reminger Co., LPA
Evidence: Hearsay and Its Exceptions

11:45a.m. - 12:15p.m. ***Lunch Break***

12:15 p.m. – 1:00 p.m.
Katie Cretella
Trumbull County Mental Health & Recovery
Access to Mental Health and Addiction Services

1:00 p.m. -2:00 p.m.
Kimberly Vanover Riley, Esq.
Montgomery Jonson LLP
Lawyer Advertising & Solicitation: Just Do It or Just Say No?

2:00 p.m. - 2:15 p.m. ***Refreshment Break***

2:15 p.m. - 3:15 p.m.
Hon. Robert N. Rusu, Jr.
Mahoning County Probate Court
Hon. Thomas M. Baronzzi
Columbiana County Probate Court
Hon. Jack R. Puffenberger
Lucas County Probate Court
Current Topics in Probate

3:15 p.m. - 3:30 p.m.
Hon. James A. Fredericka
Trumbull County Probate Court
Case Law Update

PROBATE COURT UPDATES
PANEL DISCUSSION

John T. Shorts, Magistrate

Christopher J. Schiavone, Magistrate

Emily Clark Weston, 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
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
Estates With Litigation
Land Sales

MAGISTRATE EMILY CLARK WESTON

Trumbull County Probate Court

Emily Clark Weston is a life-long resident of Trumbull County, Ohio. She was admitted to the Ohio State Bar in 2012.

Education: Kent State University (B.A., 2007, Justice Studies, Cum Laude); University of Akron (J.D. Fall 2011)

Personal: Married to John Weston

Work History: Magistrate, Trumbull County Probate Court, 2016-Present

Staff Attorney, Trumbull County Probate Court, 2014-2016

Private Practice, 2012-2016

Organizations: Trumbull County Bar Association, Ohio State Bar Association, Ohio Association of Magistrates, and National College of Probate Judges

Community Service: Guardian Angels of Trumbull County

WEALTH PLANNING FOR A BRAVE NEW WORLD:

It's All in the Family…What's a Family?

R. Hugh Magill
President-Granite River Consulting, LLC
Retired Vice Chairman-The Northern Trust Company

Probate Practice Seminar Questions

ORC § 2127 - Land Sales

- ORC § 2127.01 - All proceedings for the sale of lands by executors, administrators, and guardians shall be in accordance with section 2127.01 to 2127.43, inclusive, of the Revised Code, except where the executor has testamentary power of sale, and in that case the executor may proceed under such sections or under the will.

When is a Land Sale Necessary?

- No Power of Sale in Will
- Owner under Guardianship
- Minor Parties

Consent Sale

- SPF 11.0 – Consent to Sell Real Estate
- If all necessary parties consent, Land Sale not required
- If all consent, property may be sold at no less than 80% of appraised value
- **If any party is a minor**, Consent Sale **cannot** take place and **Land Sale is required**

Decedent Estate Complaint

- Basis for Sale (ORC § § 2127.02-2127.04)
  - Pay Debts
  - Pay Legacies
  - Other Circumstances
- Necessary Parties (ORC § 2127.12)
  - Surviving Spouse
  - All Persons Entitled to Inherit
  - Mortgage and Lienholders
  - All Persons Holding Title
  - All Other Interested Parties
  - **County Treasurer**

ORC § 2127.12 - Necessary parties in sale by executor or administrator

- In an action by an executor or administrator to obtain authority to sell real property, the following persons shall be made parties defendant:
- (A) The surviving spouse;
- (B) The heirs, devisees, or persons entitled to the next estate of inheritance from the decedent in the real property and having an interest in it, but their spouses need not be made parties defendant;

ORC § 2127.12 - Necessary parties in sale by executor or administrator

- (C) All mortgagees and other lienholders whose claims affect the real property or any part of it;
- (D) If the interest subject to sale is equitable, all persons holding legal title to the interest or any part of it, and those who are entitled to the purchase money for it, other than creditors;
- (E) If a fraudulent transfer is sought to be set aside, all persons holding or claiming under the transfer;
- (F) All other persons having an interest in the real property.

Guardianship Complaint

- Basis for Sale (ORC § 2127.05)
- Necessary Parties (ORC § 2127.13)
  - Ward
  - Ward's Spouse
  - Ward's Next of Kin Residing in Ohio
  - All lienholders
  - All Other Interested Parties
  - **County Treasurer**

ORC § 2127.13 - Necessary parties in sale by guardian

- In an action by a guardian to obtain authority to sell the real property of the guardian's ward the following persons shall be made parties defendant:
- (A) The ward;
- (B) The spouse of the ward;
- (C) All persons entitled to the next estate of inheritance from the ward in the real property who are known to reside in Ohio, but their spouses need not be made parties defendant;

ORC § 2127.13 - Necessary parties in sale by guardian

- (D) All lienholders whose claims affect the real property or any part of the property;
- (E) If the interest subject to the sale is equitable, all persons holding legal title to the real property or any part of the property;
- (F) All other persons having an interest in the real property, other than creditors.

Procedure/Practice Tips

- Preliminary Judicial Report (PJR)
  - Obtain before filing Complaint to determine if additional necessary parties
- File Land Sale Prior to Foreclosure
- Allege Why Property Needs Sold

Order and Confirmation of Sale

- Order for Public or Private Sale
- Upon Sale, Court Confirms Sale
- Authorizes Deed and Orders Distribution of Sale Proceeds and Release of Liens
- Entry Confirming Include Gross Amount of Sales Proceeds, Copy of Proposed Settlement Statement, and All Proposed Disbursements

ORC § 2127.011 - Disposition of real property

- (A) In addition to the other methods provided by law or in the will and unless expressly prohibited by the will, an executor or administrator may sell at public or private sale, grant options to sell, exchange, re-exchange, or otherwise dispose of any parcel of real property belonging to the estate at any time at prices and upon terms that are consistent with this section and may execute and deliver deeds and other instruments of conveyance if all of the following conditions are met:
- (1) The surviving spouse, all of the legatees and devisees in the case of testacy, and all of the heirs in the case of intestacy, give written consent to a power of sale for a particular parcel of real property or to a power of sale for all the real property belonging to the estate. Each consent to a power of sale provided for in this section shall be filed in the probate court.

ORC § 2127.011 - Disposition of real property

- (2) Any sale under a power of sale authorized pursuant to this section shall be made at a price of at least eighty per cent of the appraised value, as set forth in an approved inventory.
- (3) No power of sale provided for in this section is effective if the surviving spouse or any legatee, devisee, or heir is a minor. ***No person may give the consent of the minor that is required by this section.***
- (B) A surviving spouse who is the executor or administrator may sell real property to self pursuant to this section.

ORC § 2127.04 - Action for authority to sell real property

- (A) With the consent of all persons entitled to share in an estate upon distribution, the executor, administrator, or administrator with the will annexed may, and upon the request of these persons shall, commence an action in the probate court for authority to sell any part or all of the decedent's real property, even though the real property is not required to be sold to pay debts or legacies. A guardian may make a request under this division, or give consent, on behalf of the guardian's ward.
- (B) An executor, administrator, or administrator with the will annexed may commence an action in the probate court, on the executor or administrator's own motion, to sell any part or all of the decedent's real property, even though the real property is not required to be sold to pay debts or legacies. The court shall not issue an order of sale in the action unless one of the categories specified in divisions (B)(1)(a), (b), and (c), (B)(2)(a), (b), and (c), and (B)(3) of this section applies:

ORC § 2127.04 - Action for authority to sell real property

- (1)(a) At least fifty per cent of all the persons interested in the real property proposed to be sold have consented to the sale.
- (b) Prior to the issuance of the order, no written objection is filed with the court by any person or persons who hold aggregate interests in the interest of the decedent in the real property proposed to be sold, that total in excess of twenty-five per cent.
- (c) The court determines that the sale is in the best interest of the decedent's estate.
- (2)(a) No person's interest in the interest of the decedent in the real property proposed to be sold exceeds ten per cent.
- (b) Prior to the issuance of the order, no written objection is filed with the court by any person or persons who hold aggregate interests in the interest of the decedent in the real property proposed to be sold, that total in excess of twenty-five per cent.
- (c) The court determines that the sale is in the best interest of the decedent's estate.

ORC § 2127.04 - Action for authority to sell real property

- (3) The real property proposed to be sold escheats to the state under division (K) of section 2105.06 of the Revised Code.
- (C) Notwithstanding any provision of the Revised Code, an executor, administrator, or administrator with the will annexed shall commence an action in the probate court to sell any part or all of the decedent's real property if any person who is entitled to inherit all or part of the real property cannot be found after a due and diligent search. The court shall not issue an order of sale in the action unless the sale is in the best interest of the person who cannot be found and in the best interest of the decedent's estate.
- If a sale is ordered under this division, the costs of its administration shall be taken from the proceeds of the sale.
- (D) A surviving spouse who is an executor or administrator of the decedent spouse's estate is not disqualified, by reason of being executor or administrator, as a person to whom a parcel of real property may be sold pursuant to this section.

ORC § 2127 - Land Sales

- 2127.10 – Action to sell real property
  - An action to obtain authority to sell real property shall be commenced by the executor, administrator, or guardian by filing a complaint with the probate court.

ORC § 2127 - Land Sales

- The complaint shall contain a description of the real property proposed to be sold and its value, as near as can be ascertained, a statement of the nature of the interest of the decedent or ward in the real property, a recital of all mortgages and liens upon and adverse interests in the real property, the facts showing the reason or necessity for the sale, and any additional facts necessary to constitute the cause of action under the section of the Revised Code on which the action is predicated.

Minor Heir

- If Minor is receiving $25,000.00 or more, Guardianship of Minor is required
- If less, funds may be placed into a restricted account in Minor's name
- File Application to Pay or Deliver

Family Allowance

- **Question**: Since the 11th District has determined that surviving spouses have an automatic right to the allowance for support, should fiduciaries obtain a waiver from a surviving spouse if he or she does not want the allowance for support in order to close the Estate? If no waiver is obtained, could a surviving spouse move to reopen the Estate at a later date for the allowance of support?

In Re: Estate of Cvanciger (2015-Ohio-4318)

- Dorothy Cvanciger aka Starlin died April 8, 2012, leaving Surviving Spouse and four adult children from prior marriage
- Decedent's Will permitted Surviving Spouse to reside in mansion house for one year and left personal property to two children, with residue to all four children
- Surviving Spouse received Summary of General Rights of Surviving Spouse and took against Will

In Re: Estate of Cvanciger (2015-Ohio-4318) (Continued)

- Surviving Spouse filed a Motion for Allowance of Support asking for Family Allowance once real property sold (only asset) – Real property Sold for $42,800
- Trial Court Granted Motion and Fiduciary Objected on Grounds that Motion was Untimely
- Approval of Family Allowance Vacated and Set for Hearing
- Magistrate found Surviving Spouse did not Waive Family Allowance and Entitled to Receive

In Re: Estate of Cvanciger (2015-Ohio-4318) (Continued)

- Fiduciary Objected to Magistrate's Decision
- Trial Court Overruled Objections and Fiduciary Appealed

In Re: Estate of Cvanciger (2015-Ohio-4318) (Continued)

- Is Family Allowance an Absolute Right and Automatic?
- R.C. 2106.13, regarding the allowance for support, provides in part:
  - (A) If a person dies leaving a surviving spouse and no minor children, * * * the surviving spouse * * * *shall be entitled to receive* * * * in money or property the sum of forty thousand dollars as an allowance for support. * * * The money or property set off as an allowance for support shall be considered estate assets.
  - (B) The probate court *shall order the distribution of the allowance for support* described in division (A) of this section as follows:
    - (1) If the person died leaving a surviving spouse and no minor children, one hundred per cent to the surviving spouse * * *.
- (Emphasis added.)

In Re: Estate of Cvanciger (2015-Ohio-4318) (Continued)

- "The use of the word 'shall' in a statute indicates the provision's mandatory nature, leaving the court with no discretion." *In re Dohm, 11th Dist. Lake No.* 2010-L-091, 2011-Ohio-1166, ¶11, citing *State ex rel. Law Office Pub. Defender v. Rosencrans, 111 Ohio St.3d 338, 2006-Ohio-5793*
- Mandatory Nature of Statute – Court has No Discretion
- Entitlement to Allowance is Unqualified and Not Conditioned on Compliance with R.C. 2106.25 (5 Month Limitation for Exercise of Rights of Surviving Spouse)
- Legislature Did Not Intend to Require Surviving Spouse to Assert Allowance within Limitation Period
- 5 Month Limitation Only Applies if Court Must Allocate

In Re: Estate of Cvanciger (2015-Ohio-4318) (Continued)

- Although Right to Family Allowance is Absolute, it can be Waived (*In re Estate of Earley, 4th Dist. Washington No. 00CA34, 2001* Ohio App. LEXIS 4286 (Aug. 24, 2001))
- Without Will or Antenuptial Agreement Barring Family Allowance it is Automatic (*Jacobsen v. Cleveland*
- *Trust Co., 6 Ohio Misc. 173 (C.P. Lake 1965)*)

Estate of John J. Kuzman (2019-Ohio-4135)

- Decedent died intestate in 2010 and Tax Only Estate filed in 2010 for OET Return
  - Left Surviving Spouse (Helen) and children (none of whom were children of Helen)
- Assets in Decedent's name discovered in 2017 and son, John J. Kuzman Jr., applied to administer and was appointed
- Fiduciary of Helen's Estate filed an Application for Family Allowance in John's Estate

Estate of John J. Kuzman (2019-Ohio-4135) (Continued)

- John Jr. Opposed Application for Family Allowance & Argued Helen's Conduct Waived Family Allowance
- Helen Cashed Dividend Checks Belonging to Estate in Amount of $12,441.60 between Decedent's Death and her death
- Trial Court found Helen Waived and Decision Appealed

Estate of John J. Kuzman (2019-Ohio-4135) (Continued)

- Upon addressing the spousal allowance, the Ohio Supreme Court stated:
  - "unquestionably, the provision made for the benefit of the surviving spouse could be waived by her, but such waiver must clearly appear. Since by law she was entitled to a beneficial interest, a presumption arises that it was her intention to claim and accept it. Lessee of Mitchell v. Ryan, 3 Ohio St. 377; Harvey v. Gardner, 41 Ohio St. 642." *Stetson v. Hoyt, 139 Ohio St. 345, 348-49, 40 N.E.2d 128, 129 (1942); In re Burchett, 16 Ohio* App.2d 45, 241 N.E.2d 787 (3d Dist.1968).

Estate of John J. Kuzman (2019-Ohio-4135) (Continued)

- Must "clearly appear" that spouse had both knowledge of the right and an intention to forgo said right
- No evidence Helen knew she was entitled to Family Allowance or that she intended to waive it

Real Estate

- **Question**: Please explain the appropriate application of ORC § 317.22 and when it should be used instead of probate options.

ORC § 317.22 - Prerequisites to recording

- No deed of absolute conveyance of land or any conveyance, absolute or otherwise, of minerals or mineral rights shall be recorded by the county recorder until:
- (A) The conveyance presented to the county recorder bears the stamp of the county auditor stating the conveyance has been examined and the grantor has complied with section 319.202 of the Revised Code;
- (B) Such conveyance has been presented to the county auditor, and by the county auditor indorsed "transferred," or "transfer not necessary."

ORC § 317.22 - Prerequisites to recording

- Before any real estate, the title to which has passed under the laws of descent, is transferred from the name of the ancestor to the heir at law or next of kin of such ancestor, or to any grantee of such heir or next of kin; and before any deed or conveyance of real estate made by any such heir or next of kin is presented to or filed for record by the recorder, the heir or next of kin, or that person's grantee, agent, or attorney shall present to the auditor the affidavit of such heir or next of kin, or of two persons resident of this state, each of whom has personal knowledge of the facts. Such affidavit shall set forth the date of the ancestor's death, and the place of residence at the time of death; the fact that the ancestor died intestate; the names, ages, and addresses, so far as known and can be ascertained, of each of such ancestor's heirs at law and next of kin, who, by the ancestor's death, inherited such real estate, the relationship of each to the ancestor, and the part or portion of such real estate inherited by each. Such transfers shall be made by the auditor in accordance with the statement contained in the affidavit, and the auditor shall indorse upon the deed or conveyance the fact that such transfer was made by affidavit. The affidavit shall be filed with the county recorder of the county in which such real estate is situated, at or before the time such deed or conveyance is filed with the county recorder, and shall be recorded by the county recorder of the county in the official records and indexed in the direct and reverse indexes in the county recorder's office, in the name of such ancestor as grantor and of each such heir or next of kin as grantee, in the same manner as if such names occurred in a deed of conveyance from the ancestor to such heirs at law. The county recorder shall receive the same fees for such indexing and recording as provided by section 317.32 of the Revised Code.

ORC § 317.22 - Prerequisites to recording

- (C) The record of such affidavit shall, in the trial of any cause, so far as competent, be prima-facie evidence.
- (D) No county recorder shall record a conveyance if the indorsement, indorsements, or stamps of indorsement of a county auditor indicating compliance with section 319.202 of the Revised Code on the conveyance are in whole or in part defaced, illegible, or incomplete.

Claims Against Estate

- **Question**: Please explain the new statute on Claims Against Estate.

ORC § 2117.06 - Presentation and allowance of creditor's claims - pending action against decedent

- (A) All creditors having claims against an estate, including claims arising out of contract, out of tort, on cognovit notes, or on judgments, whether due or not due, secured or unsecured, liquidated or unliquidated, shall present their claims in one of the following manners:
- (1) After the appointment of an executor or administrator and prior to the filing of a final account or a certificate of termination, in one of the following manners:
- (a) To the executor or administrator, or to an attorney who is identified as counsel for the executor or administrator in the probate court records for the estate of the decedent, in a writing;
- (b) To the probate court in a writing that includes the probate court case number of the decedent's estate;

ORC § 2117.06 - Presentation and allowance of creditor's claims - pending action against decedent

- (c) In a writing that is actually received by the executor or administrator, or by an attorney who is identified as counsel for the executor or administrator in the probate court records for the estate of the decedent, within the appropriate time specified in division (B) of this section and without regard to whom the writing is addressed. For purposes of this division, if an executor or administrator is not a natural person, the writing shall be considered as being actually received by the executor or administrator only if the person charged with the primary responsibility of administering the estate of the decedent actually receives the writing within the appropriate time specified in division (B) of this section.

Deceased Next of Kin

- **Question**: What are the Notice and other procedures when a next of kin dies after death of Decedent?

Deceased Next of Kin (Continued)

- Deceased Next of Kin Entitled to Notice
- Will an Estate be opened for Deceased Next of Kin?
  - Yes – Next of Kin's Estate Receives Notice
  - No – Sometimes, Motion to Bypass for Notice Purposes is Acceptable
- Will Deceased Next of Kin Inherit?
  - Yes – Estate for Next of Kin Necessary
  - No – Estate for Next of Kin Not Necessary - Notice may be Bypassed

Burden of Proof

- **Question**: What is the burden of proof required in an undue influence case?
  - Clear and Convincing Evidence

CV 633.05 Under (undue) (improper) influence defined *[Rev. 4/15/23]*

- 1. GENERAL. The plaintiff claims that the person making the (will) (codicil) (*describe will substitute*) was under (undue) (improper) influence at the time that he/she signed the (will) (codicil) (*describe will substitute*).
- 2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by clear and convincing evidence that
- (A) (*insert name of person making will/codicil/will substitute*) was a person who was or could have been (unduly) (improperly) influenced due to his/her (advanced age) (physical infirmities) (mental condition) (fear) (*describe other reason*) to yield to the desire or intent of another; and
- (B) the opportunity existed for a person to exert (undue) (improper) influence on (*insert name of person making will/codicil/will substitute*); and
- (C) (undue) (improper) influence was exerted or attempted on (*insert name of person making will/codicil/will substitute*); and

CV 633.05 Under (undue) (improper) influence defined *[Rev. 4/15/23] (Continued)*

- 3. (UNDUE) (IMPROPER) INFLUENCE. ("Undue influence") ("Improper influence") sufficient to invalidate a (will) (codicil) (*describe will substitute*) means that which substitutes the plans or desires of another for those of the person making the (will) (codicil) (*describe will substitute*). The influence must be such as to control the mind of the person making the (will) (codicil) (*describe will substitute*) to overcome his/her power of resistance and to result in his/her making a distribution of property that he/she would not have made if he/she were left to act freely and according to his/her own plans and desires.
- 4. GENERAL INFLUENCE. "General influence," however strong or compelling, is not "(undue) (improper) influence" unless it is brought to bear directly upon the act of making the (will) (codicil) (*describe will substitute*) and imposes another person's plans or desires upon the person making the (will) (codicil) (*describe will substitute*). If the (will) (codicil) (*describe will substitute*), as finally executed, expresses the free and voluntary plans and desires of the person making the (will) (codicil) (*describe will substitute*), the (will) (codicil) (*describe will substitute*) is valid regardless of the exercise of influence.

CV 633.05 Under (undue) (improper) influence defined *[Rev. 4/15/23] (Continued)*

- 5. CONFIDENTIAL OR FIDUCIARY RELATIONSHIP: PRESUMPTION (ADDITIONAL). A person in a confidential or fiduciary relationship may have more opportunity to exert (undue) (improper) influence than a mere acquaintance. A (will) (codicil) (*describe will substitute*) is therefore looked upon with some suspicion that (undue) (improper) influence may have been brought to bear on the person making the (will) (codicil) (*describe will substitute*) if a confidential or fiduciary relationship exists. If you find that a confidential or fiduciary relationship existed between the person making the (will) (codicil) (*describe will substitute*) and the beneficiary, then you may, but are not required, to find the exercise of (undue) (improper) influence.
- (A) CONFIDENTIAL RELATIONSHIP. A "confidential relationship" exists whenever trust and confidence is placed in the integrity and (fidelity) (loyalty) of another. A "confidential relationship" can be moral, social, domestic, or merely personal in nature.
- (B) FIDUCIARY RELATIONSHIP. A "fiduciary relationship" is a relationship in which special confidence and trust is placed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust. A "fiduciary relationship" may be created out of an informal relationship, but this is done only when both parties understand that a special trust or confidence has been established. A "fiduciary relationship" may also exist when there is some formal legal relationship such as one created by a power of attorney.

CV 633.05 Under (undue) (improper) influence defined *[Rev. 4/15/23] (Continued)*

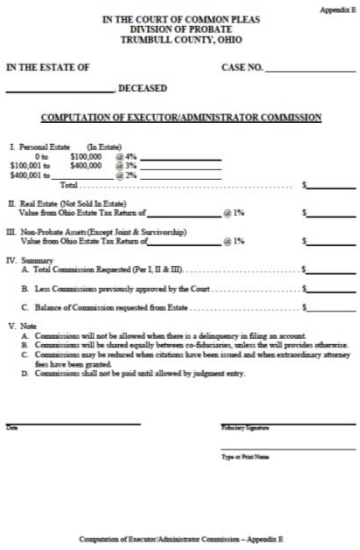
- 6. CLEAR AND CONVINCING. OJI-CV 303.07.
- 7. CONCLUSION FOR PLAINTIFF. If you find by clear and convincing evidence that the plaintiff proved his/her claim that (undue) (improper) influence was exerted by or on behalf of the defendant on the person making the (will) (codicil) (*describe will substitute*) at the time of the (making) (signing) of the (will) (codicil) (*describe will substitute*), then you will enter a verdict for the plaintiff.
- 8. CONCLUSION FOR DEFENDANT. If you find that the plaintiff failed to prove his/her claim by clear and convincing evidence that (undue) (improper) influence was exerted on the person making the (will) (codicil) (*describe will substitute*) at the time of the (making) (signing) of the (will) (codicil) (*describe will substitute*), then you will enter a verdict for the defendant.

Clear and Convincing Evidence

- Definition: *In re Chappell* (1938), 33 N.E.2d 393, 397: "...that degree of proof which will produce in the mind of the court a firm belief or conviction of the truth of the charges and specifications sought to be established. *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph 3 of the syllabus: "Clear and convincing evidence is that measure or degree of proof which is more than a mere 'preponderance of the evidence, ' but not to the extent of such certainty as is required by 'beyond a reasonable doubt ' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts to be established." Also see *Lansdowne v. Beacon Journal Publishing Co.* (1987), 32 Ohio St. 3d 176, 180-181; *In re Meyer* (1994), 98 Ohio App. 3d 189, 195; *Cincinnati Bar Assn. v. Massengale* (1991), 58 Ohio St. 3d 121, 122; *In re Adoption of Holcomb* (1985), 18 Ohio St. 3d 361, 368; *In re Brown* (1994), 98 Ohio App. 3d 337, 342-343.

Fees

- **<u>Question</u>**: As to Appendix E, when real estate is sold in an estate pursuant to statutory or testamentary power, the Fiduciary is allowed to treat the purchase price as personal property and get a 4% commission on the first $100,000 and 3% on the next $300,000, etc. In the same scenario, counsel of record is allowed under Appendix C a fee for the same equal to 3% of the first $25,000 of Inventory value and 2% of the excess. Is this difference an anomaly?



Appendix E

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

IN THE ESTATE OF _____ CASE NO. _____

_____ DECEASED

COMPUTATION OF EXECUTOR/ADMINISTRATOR COMMISSION

I. Personal Estate (In Estate)
0 to $100,000 @ 4% _____
$100,001 to $400,000 @ 3% _____
$400,001 to _____ @ 2% _____
Total ..... $_____

II. Real Estate (Not Sold In Estate)
Value from Ohio Estate Tax Return of _____ @ 1% $_____

III. Non-Probate Assets (Except Joint & Survivorship)
Value from Ohio Estate Tax Return of _____ @ 1% $_____

IV. Summary
A. Total Commission Requested (Per I, II & III) ..... $_____
B. Less Commissions previously approved by the Court ..... $_____
C. Balance of Commission requested from Estate ..... $_____

V. Note
A. Commissions will not be allowed when there is a delinquency in filing an account.
B. Commissions will be shared equally between co-fiduciaries, unless the will provides otherwise.
C. Commissions may be reduced when citations have been issued and when extraordinary attorney fees have been granted.
D. Commissions shall not be paid until allowed by judgment entry.

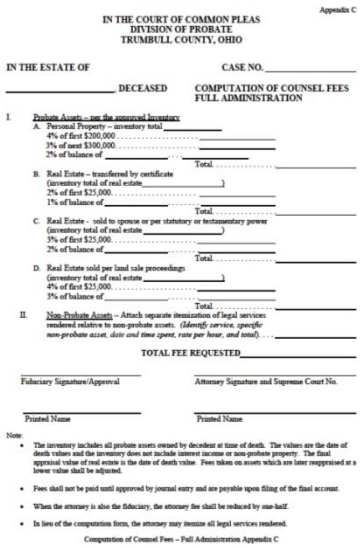
Date _____ Fiduciary Signature _____

Type or Print Name _____

Computation of Executor/Administrator Commission – Appendix E

ORC § 2113.35 – Fiduciary Commission

- (A) Executors and administrators shall be allowed fees upon the amount of all the personal property, including the income from the personal property, that is received and accounted for by them and upon the proceeds of real property that is sold, as follows:
- (1) For the first one hundred thousand dollars, at the rate of four per cent;
- (2) All above one hundred thousand dollars and not exceeding four hundred thousand dollars, at the rate of three per cent;
- (3) All above four hundred thousand dollars, at the rate of two per cent.
- (B) Executors and administrators shall be allowed a fee of one per cent on the value of real property that is not sold. Executors and administrators also shall be allowed a fee of one per cent on the value of all property that is not subject to administration and that would have been includable for purposes of computing the Ohio estate tax, except joint and survivorship property, had the decedent died on December 31, 2012, so that section 5731.02 of the Revised Code applied to the estate.
- (C) The basis of valuation for the allowance of the fees on real property sold shall be the gross proceeds of sale, and for all other property the fair market value of the other property as of the date of death of the decedent. The fees allowed to executors and administrators in this section shall be received in full compensation for all their ordinary services.
- (D) If the probate court finds, after a hearing, that an executor or administrator, in any respect, has not faithfully discharged the duties as executor or administrator, the court may deny the executor or administrator any compensation whatsoever or may allow the executor or administrator the reduced compensation that the court thinks proper.



Appendix C

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

IN THE ESTATE OF _____ DECEASED

CASE NO. _____

COMPUTATION OF COUNSEL FEES
FULL ADMINISTRATION

I. Probate Assets – per the approved Inventory
A. Personal Property – inventory total _____
4% of first $200,000 . . . . . _____
3% of next $300,000 . . . . . _____
2% of balance of _____ . . . . . _____
Total . . . . . _____

B. Real Estate – transferred by certificate
(inventory total of real estate _____)
2% of first $25,000 . . . . . _____
1% of balance of _____ . . . . . _____
Total . . . . . _____

C. Real Estate – sold to spouse or per statutory or testamentary power
(inventory total of real estate _____)
3% of first $25,000 . . . . . _____
2% of balance of _____ . . . . . _____
Total . . . . . _____

D. Real Estate sold per land sale proceedings
(inventory total of real estate _____)
4% of first $25,000 . . . . . _____
3% of balance of _____ . . . . . _____
Total . . . . . _____

II. Non-Probate Assets – Attach separate itemization of legal services rendered relative to non-probate assets. *(Identify: service, specific non-probate asset, date and time spent, rate per hour, and total)* . . . . _____

TOTAL FEE REQUESTED _____

_____ Fiduciary Signature/Approval

_____ Attorney Signature and Supreme Court No.

_____ Printed Name

_____ Printed Name

Note:

- The inventory includes all probate assets owned by decedent at time of death. The values are the date of death values and the inventory does not include interest income or non-probate property. The final appraisal value of real estate is the date of death value. Fees taken on assets which are later reappraised at a lower value shall be adjusted.
- Fees shall not be paid until approved by journal entry and are payable upon filing of the final account.
- When the attorney is also the fiduciary, the attorney fee shall be reduced by one-half.
- In lieu of the computation form, the attorney may itemize all legal services rendered.

Computation of Counsel Fees – Full Administration Appendix C

Local Rule 71.1 - Counsel Fees

- To comply with the recent decision of the 11th District Court of Appeals and pursuant to Prof. Cond. Rule 1.5, counsel fees shall be limited to reasonable and necessary legal services actually performed by the attorney. Counsel shall not be compensated for non-legal services at the hourly rate for legal services. Counsel shall have the burden of proof to show that counsel fees are reasonable and necessary and benefitted the estate, guardianship or trust.
- When counsel fees are itemized, the itemization shall include the date of the specific legal service, the time spent on each specific service, and the hourly rate charged. Counsel shall separately itemize each specific service and shall not bundle the list of services over the course of a day. The itemization for counsel fees shall not include charges for clerical work, filing, preparation of a bill, motions for counsel fees, and fiduciary work.
- Legal services includes, but is not limited to: appearances in court, drafting and preparation of pleadings and other papers for filing in court, legal advice and counsel, management of legal actions and proceedings before the court, explanation of legal consequences of specific decisions, negotiating on behalf of clients with adverse parties, preparing settlement packages, and making settlement demands.
- Paralegal and non-legal services shall be itemized separately and shall not be charged at the rate for legal work.
- If the motion for counsel fees does not comply with this rule, it will be returned to counsel for compliance.

Local Rule 71.2 – Counsel Fees

- (A) An application for allowance of counsel fees for legal services rendered as the attorney for the executor or administrator in the complete administration of a decedent's estate shall conform to the computation form attached as Appendix C or be itemized as described in (B). The Court, in its discretion, may require an application for counsel fees to be itemized as described in (B), or to conform to the computation form attached as Appendix C. The computation is used as a guideline only, and all fees will be reviewed to determine if they were reasonable and necessary.
- (B) All other applications for the allowance of counsel fees shall set forth an itemized statement of the services performed by counsel, the date services were performed, the time spent in rendering the services, and the rate charged per hour.
- (C) Counsel shall include a separate itemization for those services rendered by paralegals or other persons as required above in (B).
- (D) Expenses shall be itemized separately and shall be supported by paid receipts or cancelled checks.

Release from Administration

- Types
  - Release from Administration
  - Summary Release
  - Short Form Release
  - Real Property Only

Release from Administration – Common Issues

- Claims
  - Funeral Reimbursement
  - Medicaid Estate Recovery
  - Other Claims
- Minors
- Consents to Sell Property
- Fees – Itemized
- Notice of Probate of Will

Release from Administration

- 4 Categories of Release
  - Statutory Release from Administration
  - Summary Release
  - Short Form Release
  - Real Property Only

Statutory Release from Administration

- R.C. 2113.03
- Values
  - $100,000 if surviving spouse is entitled to receive all assets either by law or by will
  - $35,000 if anyone other than a surviving spouse will inherit
- Requires notice to all next of kin and beneficiaries of the will unless waived
- Must address debts

Summary Release

- R.C. 2113.031
- Values:
  - $40,000 + $5,000 for funeral expenses if the following apply
    - Applicant is the surviving spouse
    - The surviving spouse is entitled to 100% of the family allowance by law
    - The surviving spouse paid the funeral bill or the funeral bill was prepaid
- The lesser of $5,000 or the amount of the funeral and burial expenses paid by the applicant who is not surviving spouse
- No notice to next of kin or beneficiaries of the will
- No need to deal with debts
- Personal to the Applicant

Short Form Release

- Local Rule 75.3(C)
- Values
  - Surviving spouse and/or minor children: $20,000
  - No surviving spouse or minor children: $10,000
- Requires notice to next of kin and beneficiaries of the will unless waived
- Must address debts

Real Property Only

- R.C. 2113.61 and Local Rule 75.3(E)
- Only assets can be real property
- There can be no administration held and none can be contemplated
- There can be no Medicaid claim
- Must be filed more than 6 months after date of death
- Funeral expenses must be paid in full
- Requires notice to next of kin and will beneficiaries

Release from Administration – Common Issues

- Claims
  - Funeral Reimbursement
  - Medicaid Estate Recovery
  - Other Debts
    - WAIT 6 MONTHS TO FILE!!!
  - Insolvency
- Application for Certificate of Transfer
  - Summary Release and Real Property Only

Release from Administration – Common Issues

- Consents to sell property
- File funeral bill
  - Reflect who paid the bill
  - Waive right to reimbursement or address reimbursement in proposed entries
- Attorney Fees
- Account Numbers [45(D)]

Adoption

- Filing an Adoption
  - Do you need an adoptive placement?
    - Newborns
    - Exceptions to Placements-- 5103.16(E)
      - Stepparents
      - Grandparent
      - Grandparent's spouse
      - Legal custodian
      - Guardian

Common Problems with Adoption Petitions

- Know what type of custody your client has. Do not allege they have permanent custody if they only have legal custody.
- Both parents must be listed on the Petition as a person whose consent either is or is not required.
- If a person's consent is required, pay attention to the requirements of R.C. 3107.083.

Burdens In Contested Adoptions

- The Petitioner has the burden of proving by CLEAR AND CONVINCING EVIDENCE failure to support or failure to have contact
- The objecting party has the burden of going forward with FACIALLY JUSTIFIABLE CAUSE for such failure
- The ultimate burden remains with the Petitioner because the statute in no framed in terms of avoidance but is drafted to require Petitioner to establish all allegation including lack of justifiable cause

Adoption Local Rules of Note

- Putative parent registry must be filed 75.4(M)
- Birth certificate must have been certified no more than 30 days before filing of Petition 75.4(L)
- Required service on all persons statutorily entitled to notice, even if they have signed a consent 75.4(E)
- Accounting must be filed in every adoption 75.4(D)

Important Deadlines in Adoption Cases for the Petitioner

- Home study—10 days prior to the hearing (R.C. 3107.031)
- Prefinalization Assessment—20 days prior to the hearing (R.C. 3107.12)
- Final Account—10 Days prior to the hearing (R.C. 3107.055(D))

Important Deadline in Adoption Cases for the Objecting Parties

- Objections—14 days after proof is filed that notice was given (R.C. 3107.07(K))
  - H.B. 5
    - Eliminates the 14 day objection period and requires attendance at the hearing to object
- Putative Father Registry—15 days after birth of child (R.C. 3107.062)

When consent is not required of a parent in an adoption

- The parent has failed without justifiable cause to provide more than de minimis contact with the minor for a period of at least one year immediately preceding the filing of the adoption petition or the placement of the minor in the home of the petitioner
  - **OR**
- The parent has failed without justifiable cause to provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding the filing of the adoption petition or the placement of the minor in the home of the petitioner.

Notable and/or Recent Adoption Cases

- In re Adoption of A.K., Ohio Supreme Court, 168 Ohio St. 3d 225, 2022-Ohio-350
  - There is a "disjunctive relationship of the contact and support provisions in Section 310707(A)" which indicates that "a parent's failure to meet either provision is sufficient to nullify the need to obtain that parent's consent."

Notable and/or Recent Adoption Cases

- In re Adoption of H.P., Ohio Supreme Court, 2022-Ohio-4369
  - Failure to register as a putative father within time limit bars right to object to an adoption. A father's paternity established through DNA testing in a subsequently filed juvenile court action was inconsequential.

Notable and/or Recent Adoption Cases

- In re Adoption of B.I. ,157 Ohio St.3d 29, 2019-Ohio-2450
  - A parent is subject either to the general statutory obligation to support a child or the specific obligation imposed by judicial decree, but not both.
  - A parent's nonsupport of his minor child pursuant to a zero support order provides justifiable cause for the parent's failure to provide maintenance and support and therefore does not extinguish the requirement of that parent's consent to the adoption of the child.

Notable and/or Recent Adoption Cases

- In re Z.H., 6th Dist., 2022-Ohio-3926
  - Failure to request support is justifiable cause for no payment of support
    - Custodian grandparents did not seek child support by judicial decree. There was no support order in place rather than a no support order.
    - Custodians did not request contributions from parents.
    - "When a child's needs are adequately provided for by a custodian who is in a better financial position than the natural parent, and the custodian expresses no interest in receiving any financial interest from the natural parent, the natural parent's failure to support he child may be deemed justifiable."

Notable and/or Recent Adoption Cases

- In re Adoption of J.A.M., 2nd Dist., 2022-Ohio-2313
  - R.C. 3107.161(C) places 2 burdens on a party contesting best interests: 1. to provide material evidence to determine the best interests of the child and 2. to establish the child's current placement is not the least detrimental alternative.
    - The 2nd prong is only relevant if placement is in dispute.
  - Petitioner must prove that the adoption is in the best interest of the child.

Notable and/or Recent Adoption Cases

- In re Adoption of G.W.K., 9th Dist., 2022-Ohio-2620
  - A request for counsel does not extend the 14 day objection period

R. HUGH MAGILL

R. Hugh Magill was Vice Chairman of The Northern Trust Company until his retirement in 2021. He is President of Granite River Consulting, where he advises families, family offices and law firms on wealth transfer, family education and governance, philanthropy, and fiduciary responsibility and risk management.

Prior to joining Northern Trust in September, 1989, Hugh practiced law privately in Chicago, and worked in the Trust Department at The First National Bank of Chicago where he served as Assistant to the Chief Investment Officer.

Magill received a B.A. degree from St. Olaf College in Northfield, Minnesota, and a J.D. degree from the University of Minnesota Law School, where he was named a distinguished alumnus in 2005.

Hugh is licensed to practice law in Illinois and Minnesota and admitted to practice before the United States Tax Court.

Magill is a Fellow of the American College of Trust and Estate Counsel, an Academician of the International Academy of Estate and Trust Law, and served as a faculty member of the ABA National Trust School for over 25 years. He has lectured for the American College of Trust and Estate Counsel, the Heckerling Institute, the Notre Dame Institute, the Kasner Institute, the Northwestern University Center for Family Enterprise, regional bar associations and estate planning councils, and Northern Trust on estate and charitable planning, trust management, family education and governance, and fiduciary risk management. He is a member of the Minnesota and American Bar Associations.

He serves as a member of the University of Min1nesota Law School Board of Advisors, Treasurer of the Cook County Community Fund, and board member of the George Young Recreational Center. He is a member of the Editorial Advisory Board of Trusts & Estates magazine, and has authored articles for Trusts & Estates, Trust & Investments, and Wealth magazines, and the ACTEC Law Journal. In 2017, he was inducted into the NAEPC Estate Planning Hall of Fame where he holds the designation of Accredited Estate Planner ® (Distinguished). Hugh is an Eagle Scout and has served as a Scoutmaster with the Boy Scouts of America.

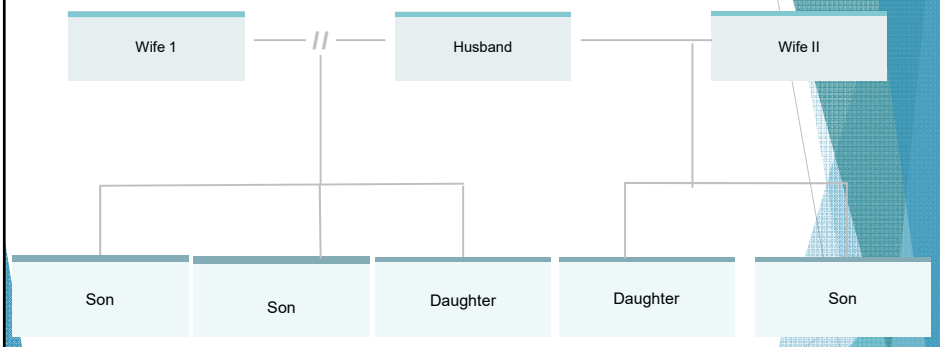
Hugh and his wife are the parents of three adult children and reside in Minneapolis and Grand Marais, Minnesota

Estate Planning and Trust Management For a Brave New World: It's All In the Family…What's a Family?

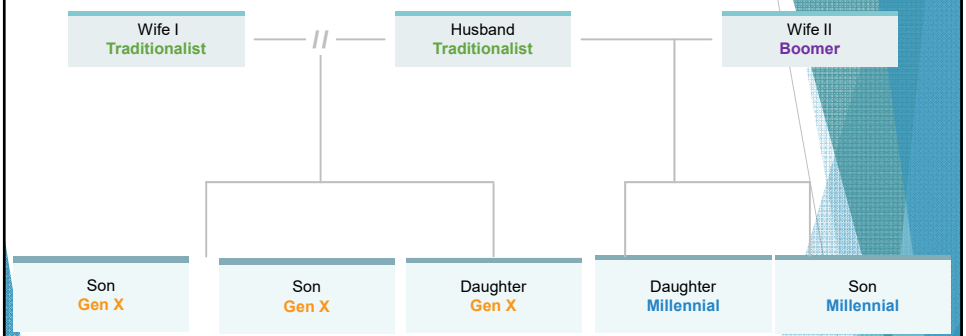
PRESENTED BY:

R. Hugh Magill
President, Granite River Consulting
Vice Chairman, Retired, The Northern Trust Company

Blended, Multi-Generational Family



Blended, Multi-Generational Family



Generalizations About Generations

U.S. Generational Assignments And Attributes

	APPROXIMATE BIRTH YEARS
Lost Generation	1883 - 1900
G. I. Generation	1900 - 1926
Silent Generation	1927 - 1945
Boomer Generation	1946- 1964
Generation X	1965 - 1980
Millennial Generation	1981 - 1996
Generation Z	1997 -

Traditionalists - The Adaptive Generation

Defining Question:
Where Were You on D-Day?

Technology Question:
When Did Your Family Get a Radio?

Grew Up During Depression, Many in Multi-Generational Households

Parental Model – Breadwinner & Bread Baker

Children Obey Adults

Personal Responsibility and Self-Sacrifice Undergird Modesty

Character Traits:

- Dutiful
- Frugal
- Committed (Marriage, Employment)
- Respectful (Authority, Institutions, Government)
- Accelerated Adulthood
- Strong Work Ethic
- Delayed Gratification
- Decision Making: Command and Control
- 89% Religiously Affiliated
- 6% Have Tattoos

Boomers - The Idealistic Generation

Defining Question:
Where Were You When President Kennedy Was Shot?

Technology Question:
When Did Your Family Get Its First Television?

Grew Up in Two-Generation Households (for first time)

Parental Model – Breadwinner & Bread Server

Children Accommodate Adults

Competence and Expertise Before Self-Esteem

Character Traits:

- Optimistic – Hard Work & Loyalty Lead to Personal Gratification
- Competitive (We Choose Sides)
- Rejected then Embraced Authority
- Adulthood Leads to the American Dream

- Live to Work
- Decision Making: Consensus
- 75.2% Religiously Affiliated
- 15% Have Tattoos

Gen X - The Reactive Generation

Defining Question:
How Old Were You When Your Parents Got Divorced?

Technology Question:
When Did Your Family Get Its First Computer?

More Likely to Grow Up in a Divorced Household

Parental Model – Breadwinner & Breadwinner (Latch-Key Kids)

Children Teach Adults

Self-Reliance and Validation Lead to Self-Esteem (and Entitlement)

Character Traits:

- Skeptical (Marriage, Corporations, Government)
- Private
- Suspicious of Authority
- Adulthood Will be Less Prosperous than Parents'

- Work/Life Balance is Very Important
- Decision Making: Pragmatic, Independent, Impatient
- 65.6% Religiously Affiliated
- 32% Have Tattoos

Millennials - The Civic Generation

Defining Question:
Where Were You on 9/11?

Technology Question:
How Old Were You When You Got Your First iPhone?

Grew Up in Diverse Households

Parental Model – Breadwinner & Breadwinner

Adults Accommodate and Consult Children

Self-Esteem Precedes Competence

Character Traits:

- Optimistic
- Collaborative, Tolerant
- Technologically Savvy, Multi-tasking
- Socially Responsible, Multi-Cultural
- Delayed Adulthood

- Work to Live…But Seek Responsibility and Recognition
- Decision Making: Net-Educated, Networked
- Largest U.S. Generation
- 57.1% Religiously Affiliated
- 38% Have Tattoos

Gen Z – The _____ Generation

Defining Question:

Technology Question:

Growing Up in Diverse Households

Parental Model – Breadwinner & (Unemployed) Breadwinner

Character Traits:

- Racially Diverse
- Highly Educated
- Pro-Government
- Socially Progressive

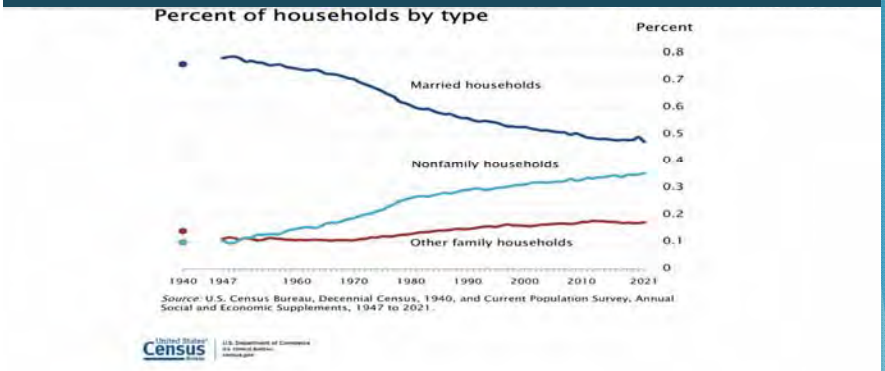
- 95% use Smartphones
- 85% Use You Tube
- 55.1% Religiously Affiliated

U.S. Life Expectancy 1860 - 2020

Family Demographics

Trends in the Prevalence of Households by Type

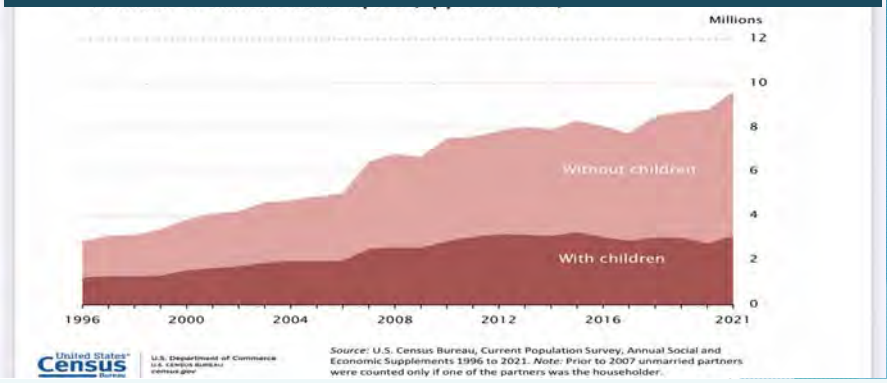
Percent of Households by Type



Source: U. S. Census Bureau, Decennial Census, 1940, and Current Population Survey, Annual Social and Economic Supplements, 1947 to 2021.

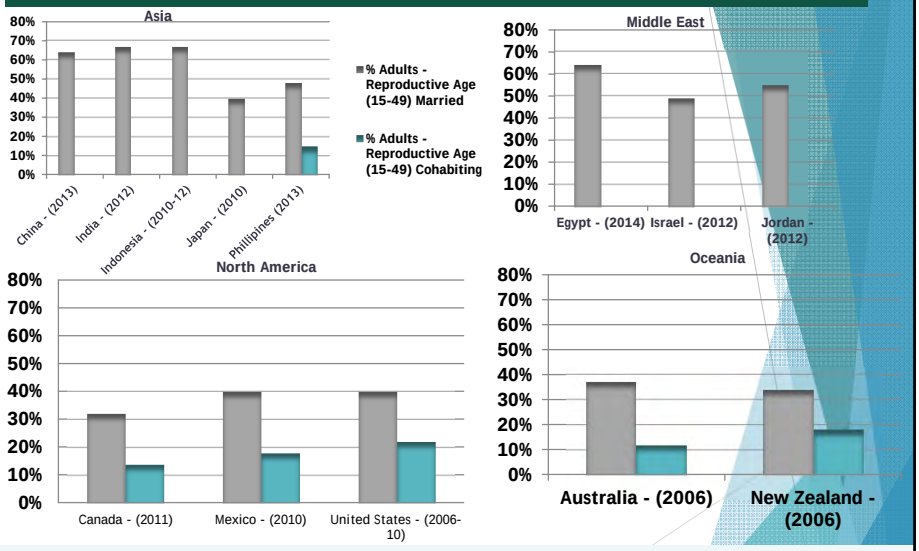
Unmarried Couples of the Opposite Sex

1996 - 2021



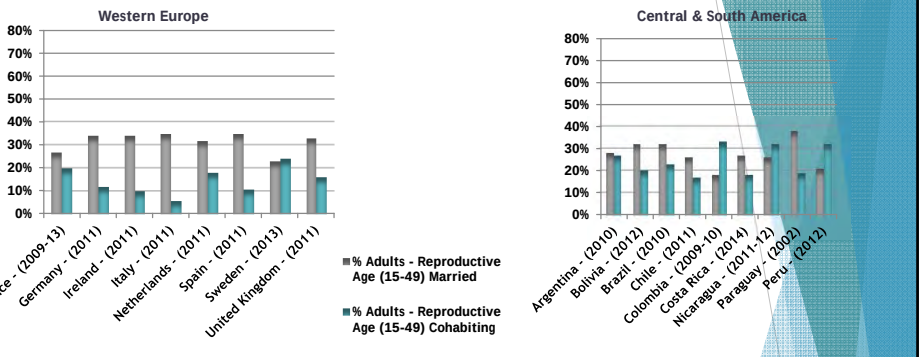
Source: U.S. Census Bureau, Current Population Survey, Annual Social And Economic Supplements 1996-2021.
NOTE: Prior to 2007, unmarried partners were counted only if one of the partners was the householder.

Marriage and Cohabitation (2000 – 2014)



Source: World Family Map 2017, Mapping Family Change and Child Well-being Outcomes, Social Trends Institute

Marriage and Cohabitation (2000 – 2014)



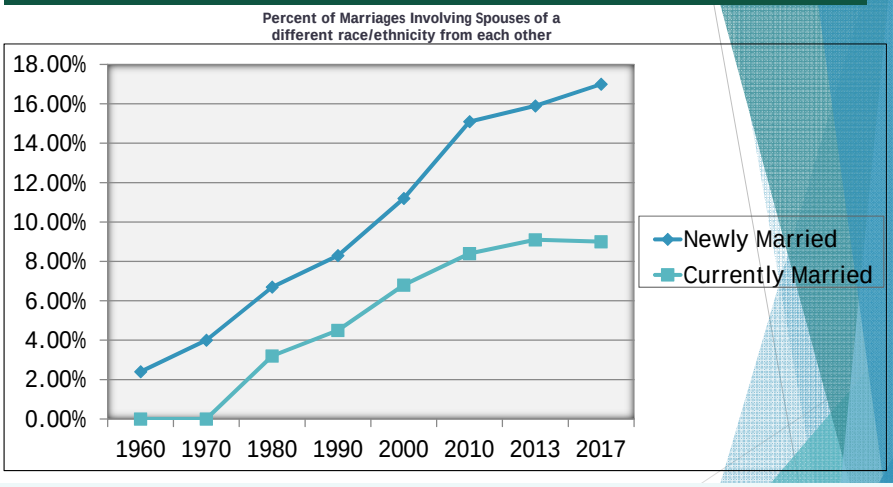
Source: World Family Map 2017, Mapping Family Change and Child Well-being Outcomes, Social Trends Institute

Median Age at First Marriage

1890 to 2021

Source: U. S. Census Bureau, Decennial Censuses, 1890 to 1940, and Current Population Survey, Annual Social and Economic Supplements, 1947 to 2015.

Inter-marriage Rates



Source: Pew Research Center analysis of 2008-2013 American Community Survey and 1980-2000 census data (IPUMS).

Changing Marital Paradigm

Old Marital Paradigm: Marriage = Cornerstone**

New Marital Paradigm: Marriage = Capstone**

*40% of children are born outside marriage. National Vital Statistics Report 2012 Martin, J.A., Hamilton, D.E. Osterman, M.J.K., Curtin, S.C. & Mathews, T.J. (2013)

**"Knot Yet: The Benefits and Costs of Delayed Marriage in America" © 2013 The National Marriage Project at The University of Virginia

Changing Views of Marriage

The Freedom to marry has long been recognized as one of the vital rights essential to the orderly pursuit of happiness by free men. Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival... [1]

Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations. The centrality of marriage to the human condition makes it unsurprising that the institution as existed for millennia and across civilizations. Since the dawn of history, marriage has transformed strangers into relatives, binding families and societies together [2]

Marriage as a family form is not more important or valuable than other forms of family, so the law should not give it more value. [3]

I suspect marriage as we have known it is not coming back. [4]

1. Loving v. Virginia, 388 U.S. 1, 12 (1967)
2. Obergefell v. Hodges, 576 U.S. _____ (2015)
3. Nancy Polikoff, Beyond (Straight and Gay) Marriage (2008)
4. Isabell V. Sawhill, "Restoring Marriage will be Difficult," Brookings Institution (2012)

Federal Aspects of Marital Status*

- Taxation
- Inheritance & Property Rights
- Rules of Intestate Succession
- Spousal Privilege in the Law of Evidence
- Hospital Access
- Medical Decision-Making Authority
- Adoption Rights
- The Rights and Benefits of Survivors
- The Rights and Benefits of Survivors
- Birth and Death Certificates
- Professional Ethics Rules
- Campaign Finance Restrictions
- Workers Compensation Benefits
- Health Insurance
- Child Custody, Support and, Visitation Rules

* Obergefell v. Hodges, 576 U.S. 644 (2015)

Changes in Family Structures

Prototypical 1950's American Family

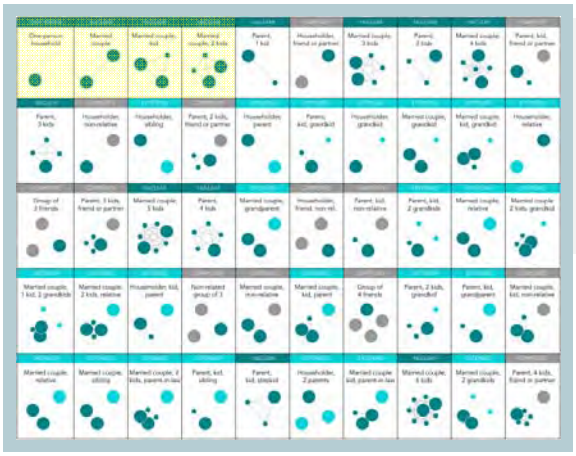
Costco ❤ Love

Love in Bulk

Costco ♥ Love

Love in Bulk

The 50 Most Common Family Types in America

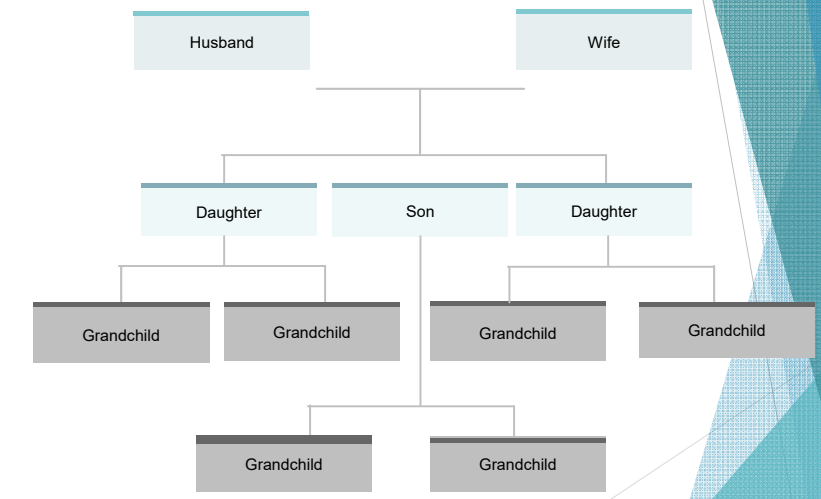


- Larger Circles: Adults
- Smaller Circles: Children/Grandchildren
- Dark Green Circles: Those in Household Nucleus
- Light Green Circles: Family Members Outside the Nucleus
- Grey Circles: Non-Relatives

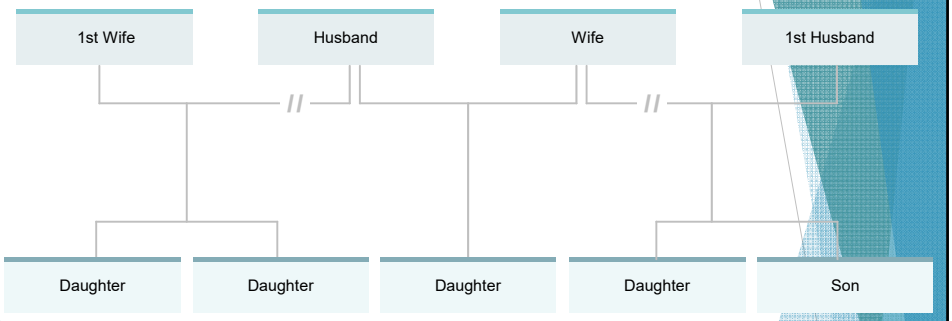
"The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household." Troxel v. Troxel, 530 U.S. 57, 63 (2000)

"Most Common Family Types in America," Nathan Yau, Flowingdata, July, 2016. American Community Survey 2010-2014, United States Census Bureau.

Traditionalist Family



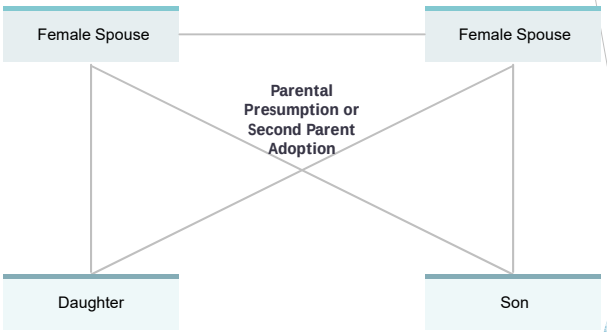
Boomer Family – Blended*



*One out of six American children live in a blended family. Pew Research Center: 10 Demographic Trends That Are Shaping the U. S. and the world

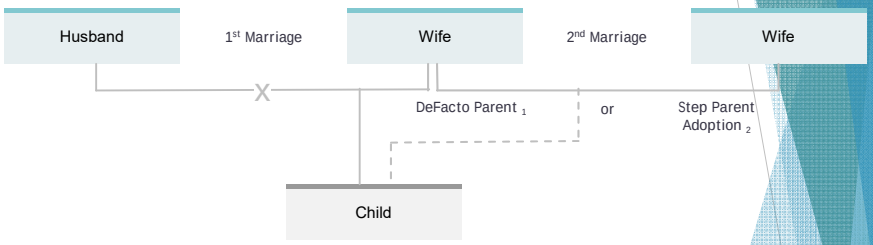
40% of American Adults have at least one step-relative in their family

Same Sex Marriage



* "The phrase 'Parental Presumption or Second Parent Adoption' refers to an independent adoption whereby a child born to (or legally adopted by) one partner is adopted by his or her non-biological or non-legal second parent, with the consent of the legal parent, and without changing the latter's rights and responsibilities." Sharon S. v. Superior Court, 73 P. 3d, 554, 558 (Cal. 2003)

3 Parent Family

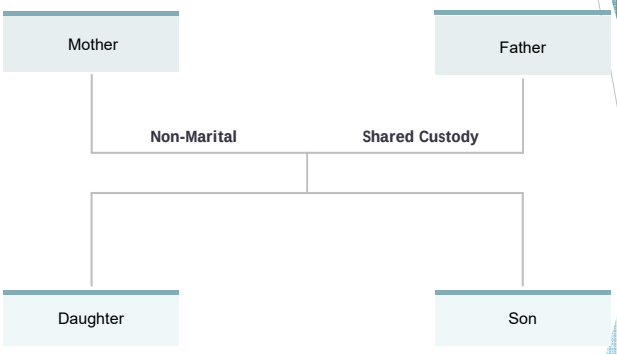


1. A De Facto parent is "one who is not a child's legal parent, but has been found by a court to have assumed on a daily basis, the role of parent, fulfilling both the child's physical and psychological needs for care and affection, and has assumed that role for a substantial period of time." California Rules of Court 5.502 (10) (2015)

2. See Between A.A. and B.B. and C.C., 2007 ONCA 2 (Can.) and LaChapelle v. Mitten, 607 N. W. 2d 151 (Minn. Ct. App. 2000) and Gelman, "What About Susan? Three's Company, Not a Crowd: The Importance of Allowing Third Parent Adoptions When Both Legal Parents Consent," 30 Wisconsin Journal of Law, Gender and Society 57(2015).

Elective Single Parenthood

Co-Parenting Arrangement



The New York Times

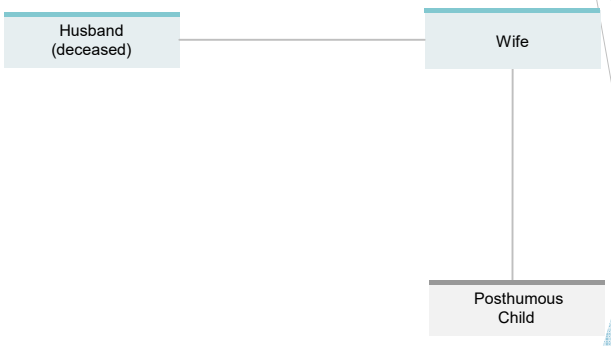
By ABBY ELLIN FEB. 8, 2013

Seeking to Reproduce without a Romantic Partnership

Rachel Hope is 5-foot-9 and likes yoga, dance and martial arts. A real estate developer and freelance writer in Los Angeles, Ms. Hope, 41, is seeking a man who lives near her, is healthy and fit, and "has his financial stuff together," she said. Parker Williams, the 42-year-old founder of QTheory, a charity auction company also in Los Angeles, would seem like a good candidate. A 6-foot-2 former model who loves animals, Mr. Williams is athletic, easygoing, compassionate and organized.

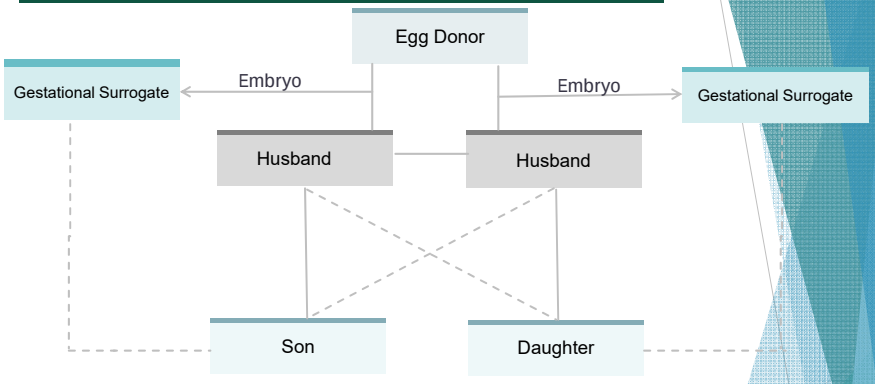
Neither Ms. Hope nor Mr. Williams is interested in a romantic liaison. But they both want a child, and they're in serious discussions about having, and raising, one together. Never mind that Mr. Williams is gay and that the two did not know of each other's existence until last October, when they met on Modamily.com, a Website for people looking to share parenting arrangements.

Posthumous Reproduction



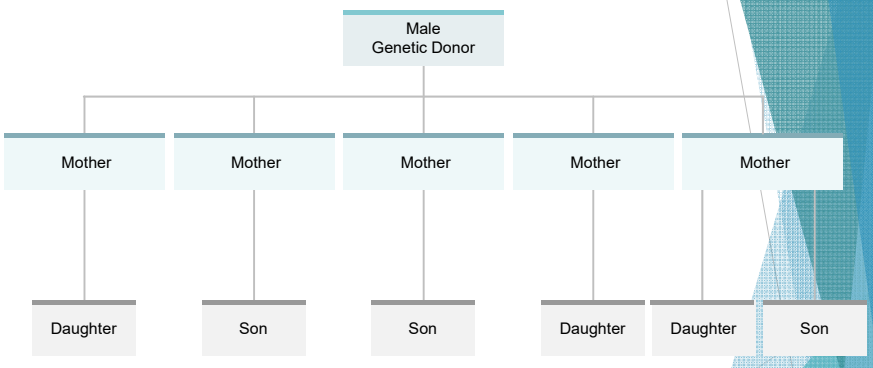
Parentage, inheritance rights, intestate succession and eligibility for Social Security survivorship benefits have been addressed, respectively, by the Uniform Parentage Act §§ 204 and 707, the Restatement (Third) of Property: Wills and Other Donative Transfers § 14.8, The Uniform Probate Code § 2 - 104 and 2-120, (2012), and the U.S. Supreme Court in Astrue v. Capato 566 U. S. 132 (2012).

Twibling Family*



* Two Men Looking for Love, and for 'Twiblings' The New York Times, March 24, 2019

Dibling Family



The Washington Post

A Lack of Regulation has Created Enormous Genetic Families. Now They are Searching for One Other.

(continued)

Ariana Eunjung Cha, September 12, 2018

Assisted Reproductive Technology: Reproductive Variables (2023)

Father	Mother	Pregnancy	Conception
→ His sperm	→ Her egg	→ Mother's womb	→ In Utero
→ Donor sperm	→ Donor Egg	→ Surrogate's womb	→ Ex Utero
→ Fresh	→ Hybrid Egg*		→ Inter Vivos
→ Frozen	→ Fresh		→ Posthumous
	→ Frozen		

*Via Spindle Nuclear Transfer Technique

Assisted Reproductive Technology

U. S. Statistics*

- 330, 773 ART cycles in the U. S. in 2019
  - 75.9% result in single births
  - 6.1% result in multiple infant births
- 121,086 ART banking cycles in the U. S. in 2019 (preserving fresh non-donor eggs or embryos for futures use)
- 1,000,000 embryos in storage in 2015
- 2.1% of infants born in U.S. annually conceived via ART

*Centers for Disease Control and Prevention, 2019 National Art Summary

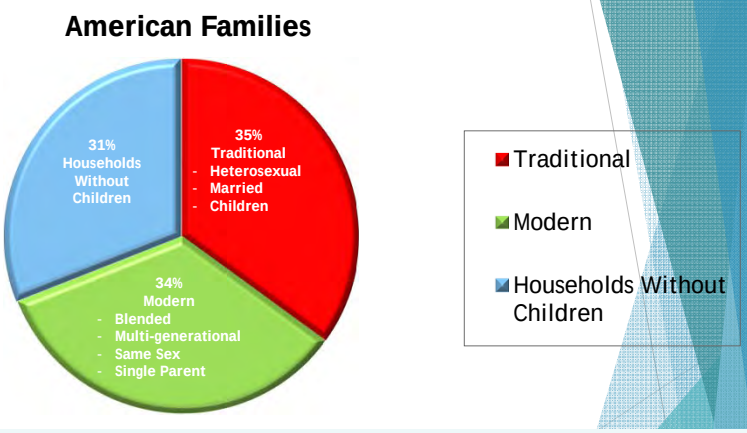
Assisted Reproduction – Old School

The New York Times, The New Sperm Economy, January 10

Assisted Reproduction - Direct to Consumer

The New York Times, The New Sperm Economy, January 10

Composition of American Families*



*United States Census Bureau "America's Families and Living Arrangements" (2013)

Estate Planning & Trust Management For A Brave New World

Demographic Changes: Strategic Issues

- How and to Whom will Financial Wealth be Allocated?
- How will Trusts Evolve for Modern Families?
- Are There Limits to Longevity?
- How will Modern Families Collaborate and Make Decisions?

How and to Whom Will Financial Wealth be Allocated?

The Health & Retirement Study

The Health & Retirement Study*

- Bi-annual survey of 20,000 Americans aged 50 and older
- Objectives:

  - Explain the antecedents and consequences of retirement
  - Examine the relationships among health, income, and wealth over time
  - Examine life cycle patterns of wealth accumulation and consumption
  - Monitor work disability
  - Examine how the mix and distribution of economic, family, and program resources affect key outcomes, including retirement, "dissaving," health declines, and institutionalization

*National Institute on Aging and University of Michigan Institute for Social Research

Health & Retirement Study Themes*

- Intestacy:

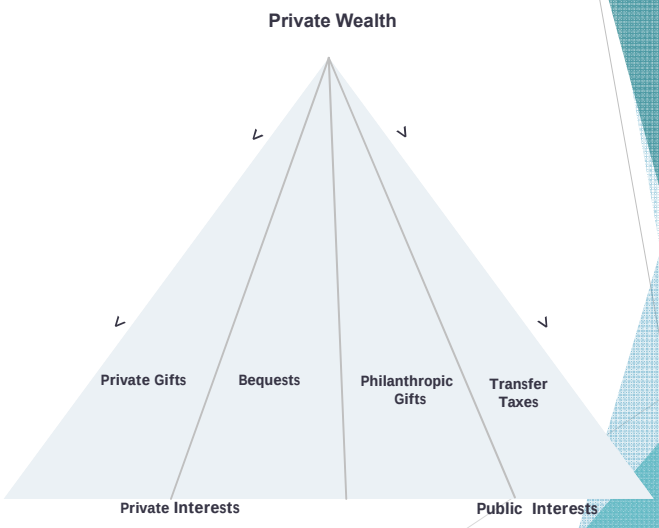
  - → 42% of all Health & Retirement Study (HRS) respondents have no will
  - → 38% of deceased HRS respondents died intestate
  - → 49% of HRS respondents with stepchildren have no will
  - → 59% of HRS "no-contact" parents have no will (parent who has had no contact with at least one genetic child for at least one year)
  - → 62% of divorced HRS respondents have no will

*Drawn from Health & Retirement Study data and National Bureau of Economic Research Working Paper "Unequal Bequests," M. Francesconi, R. Pollack, D. Tabasso. Working Paper 21692 (2015).

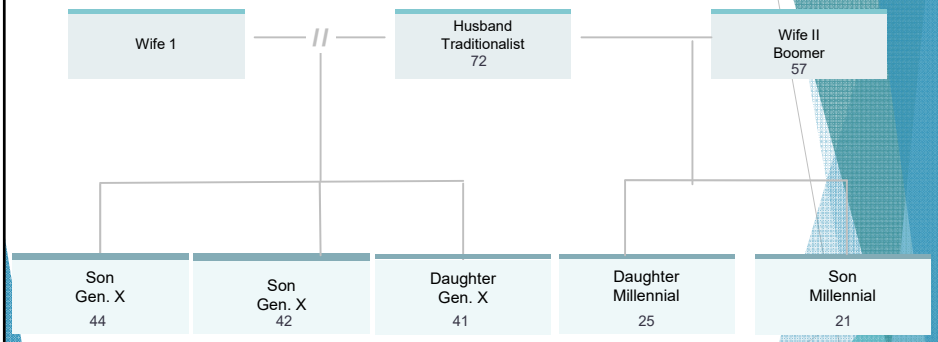
Estate Planning – Essential Questions

- To Whom/To Which
- How Much
  - Is Enough
  - Is Too Much
- When
  - To Give
  - To Discuss
- In What Form
  - Outright or in Trust
  - Trust Design and Attributes
- Who Will Serve as our Surrogate
  - For Health Care and Financial Decisions
  - For Managing Our Assets
  - To Care for Our Families

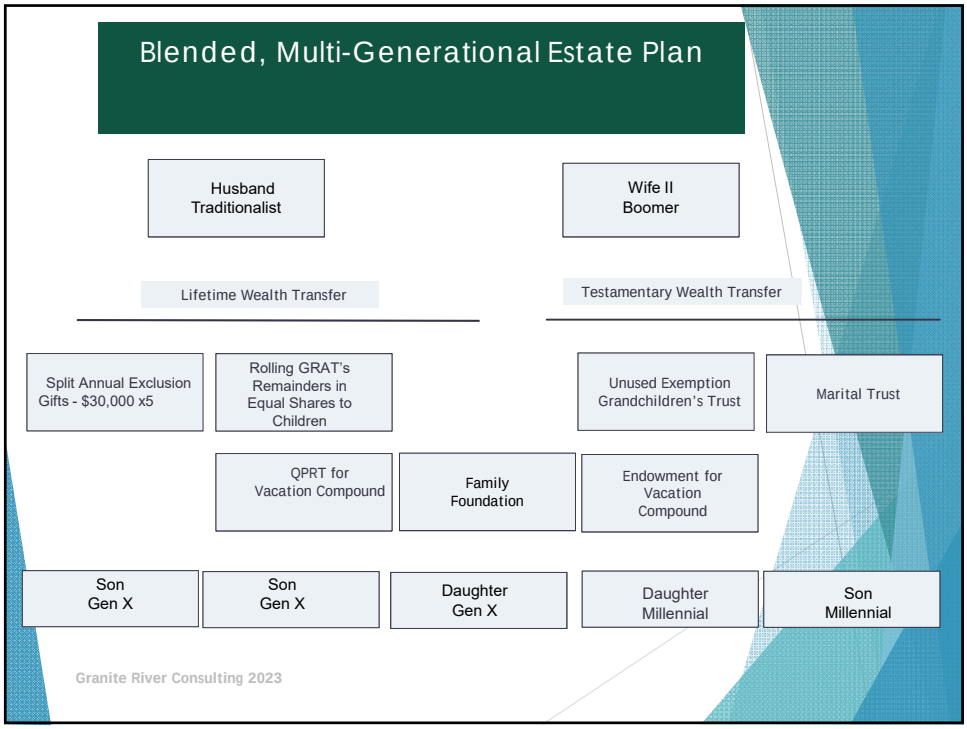
Gratuitous Transfers: Freedom of Disposition



Blended, Multi-Generational Family



Entertainment for Stepchildren


Blended, Multi-Generational Estate Plan
Husband
Traditionalist
Wife II
Boomer
Lifetime Wealth Transfer
Testamentary Wealth Transfer
Split Annual Exclusion Gifts - $30,000 x5
Rolling GRAT's Remainders in Equal Shares to Children
Unused Exemption Grandchildren's Trust
Marital Trust
QPRT for Vacation Compound
Family Foundation
Endowment for Vacation Compound
Son
Gen X
Son
Gen X
Daughter
Gen X
Daughter
Millennial
Son
Millennial
Granite River Consulting 2023


Wealth Transfer Planning for Contemporary Families
PRIOR GENERATIONS
Estate Planning
Mortality
Family Disclosure
CONTEMPORARY FAMILIES
Estate Planning
Family Dialogue
Plan Design and Implementation
Family Disclosure
Spouses/Partners
- Expectations
- Expectancies
- Goals
Parents/Partners and Children
- Family Views
- Expectations
- Hopes/Fears
Spouses/Partners and Children
- Plan
- Rationale
- Role of Advisors
- Concerns

Wealth Transfer Issues for Contemporary Families

- Wealth Sufficiency
- Generational Expectations About Financial Wealth and Estate Planning
- Lifetime v. Testamentary Wealth Allocation
- Viability of Life Estate with Remainder Construct
- Utility and Shelf Life of Spray Trusts
- Rewards and Risks of Shared Assets
- Perpetual Trusts: Family Reproduction and Per Stirpital Allocation
- Fiduciary Roles: Who Serves Whom and Why

Traditional Estate Planning Paradigm….Recast

Tax Based Transfer Tax Centric	Goals Based Tax Efficient
Hierarchical Nuclear Family Oriented	Humanistic Sensitive to Family Structure
Culturally Homogeneous	Culturally Adaptable
Predominant Focus on Financial Wealth	Holistic Understanding of Family Wealth

How Will Trusts Evolve for Modern Families?

How Will Trusts Navigate the Generational Divide?

GRANTORS

Traditionalists Boomers

- Respectful of Authority
- Control-Oriented Decision Making
- Work-Centered
- Culturally Homogenous
- Digital Learners

BENEFICIARIES

Gen-Xers Millennials

- Suspicious/Tolerant of Authority
- Pragmatic/Networked Decision Making
- Life-Centered
- Culturally Diverse
- Digital Natives

Trusts and Material Purposes

Material purposes are not readily to be inferred. A finding of such a purpose generally requires some showing of a particular concern or objective on the part of the settlor, such as concern with regard to a beneficiary's management skills, judgment, or level of maturity. Thus, a court may look for some circumstantial or other evidence indicating that the trust arrangement represented to the settlor more than a method of allocating the benefits of property among multiple intended beneficiaries, or a means of offering to the beneficiaries (but not imposing on them) a particular advantage. Sometimes, of course, the very nature or design of a trust suggests its protective nature or some other material purpose.*

*Restatement (Third) of Trusts § 65, Comment d.

The Claflin Doctrine and Material Purposes

- Tension Between Grantor Intent, Beneficiary Goals, and Fiduciary Duties
- Evolution of Standards for Early Termination and Trust Modification

- The Claflin Doctrine: Early termination of a trust may be allowed so long as it does not frustrate a Material Purpose of the settlor. Claflin v. Claflin (20 N.E. 454, Mass.1889).
- Restatement (Third) §65: Material Purposes are not readily to be inferred
- The Uniform Trust Code requires determination of a trust's Material Purpose for:
  - §111: Non-Judicial Settlement Agreements
  - §411: Modification or Termination by Consent
  - §412: Modification of Termination Because of Unanticipated Circumstances

Trust Design: Statements of Intent*

Instructions to the Trustee (and Other Fiduciaries)

Letters of Wishes

- External
- Generally unenforceable (in the U. S.)

Precatory Language

- Internal
- Aspirational

Statement of Intent: Explicit, unambiguous purpose for wealth transfer

- Language within the trust document
- Demonstrates a unique intention that is tied to the grantor's personal history, personal values or personal properties
- Articulates a direct link between unique personal intent and the purpose of the trust
- Expresses grantor's view on modification and termination
- Provides context for the trustee's exercise of discretionary powers

Public Policy Limitations

*Raymond C. Odom, The "Goal Standard" of Estate Planning (2016)

Trust Design: Statements of Intent

Communications to Beneficiaries

Wills and Trusts are a Form of Personal Communication

Ethical Wills

- Memorialize and "Transfer" Family Values

Family Mission Statements

- Formalize Family Vision and Values

Statements of Intent

- Provide Context for Financial Capital Held in Trust
- Articulate Goals for Family Wealth and Beneficiaries' Well Being
- Inform Future Generations About Family Values and Vision

Formulation of Statements of Intent

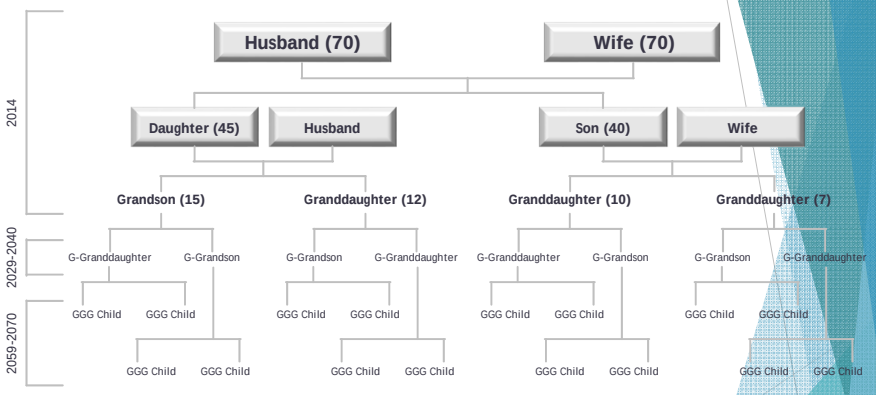
- Client Authorship
- Focus on Heritage and Legacy, Values, and Hopes
- Brevity is Best

Sample Statement of Intent

I acquired the wealth transferred into this trust at age 60 through starting a business that grew out of a personal passion. As an immigrant to this country it is essential to me that my descendants also demonstrate a lifelong commitment to economic achievement that is not available in my birth country. Therefore, this trust was created by me to serve as a financial catalyst for the personal, cultural and professional achievement of my descendants. The human need for productive personal fulfillment never retires or ends. I intend that the funds in this trust be strategically distributed throughout the entire lifetime of the designated beneficiaries. Since I have transferred substantial funds to my children outside of this trust, I intend that this trust should not be terminated prematurely to serve any alternative material purpose.

Trust Duration

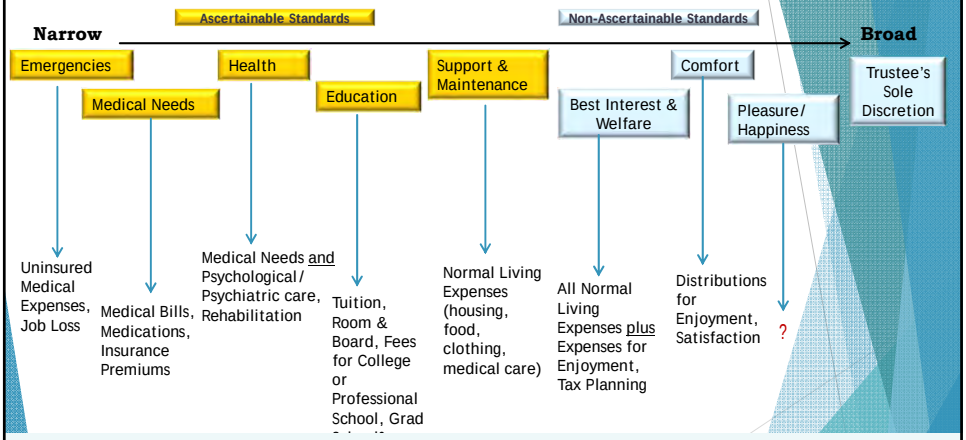
Trusts - Family Growth



Trust Design: Beneficial Interests

- Income
- Discretionary Principal
- Unitrust or Annuity Interests
- Withdrawal Rights
  - Staged
  - 5 x 5 Powers
- Mandatory Distributions
- Use of Trust Assets
- Powers of Appointment
  - Inter-Vivos
  - Testamentary
  - Limited
  - General

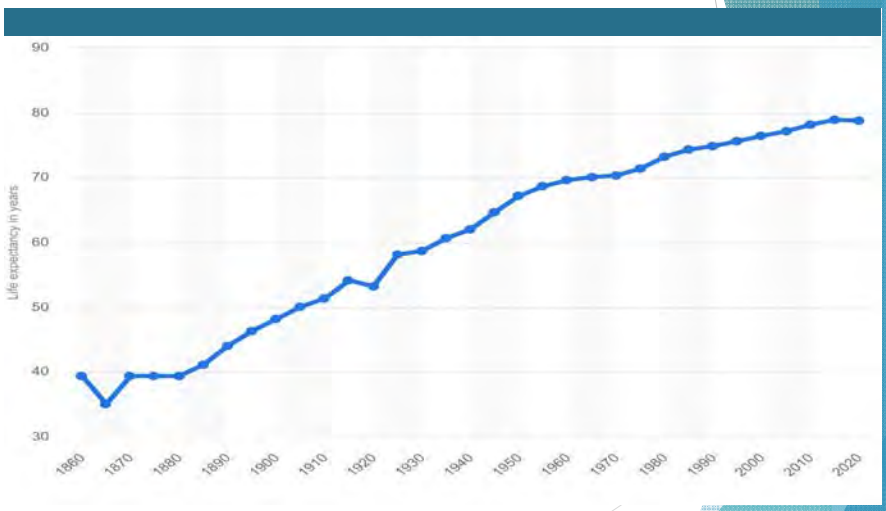
Discretionary Distribution Standards



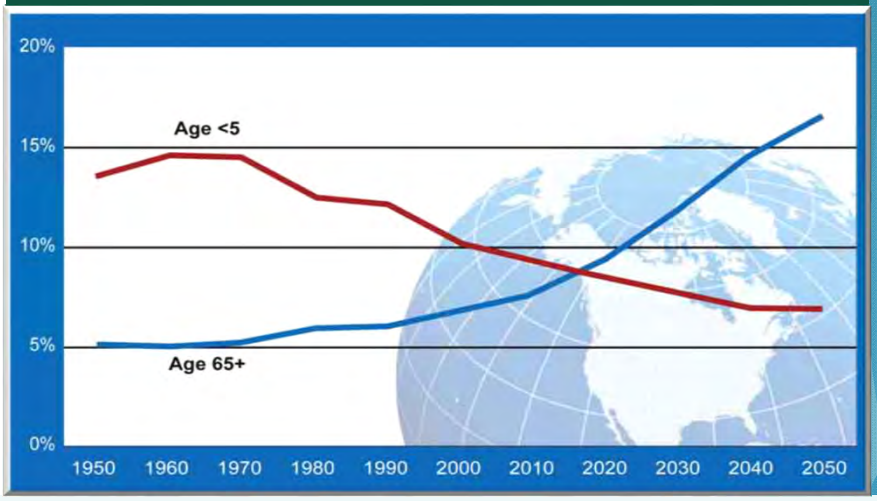
*The term "emergency" alone may not be ascertainable. See Budd v. Commissioner, 49 T.C. 468 (1968).

Longevity, Disability, Mortality… Immortality?

U.S. Life Expectancy 1900 - 2020



Young Children and Older People as a Percentage of Global Population: 1950-2050



Source: United Nations. World Population Prospects: The 2010 Revision.

(Digital) Elder "Care"

"Grandma and Grandpa need - and deserve - an attentive, caring, interesting person with whom to interact. The only such person(s) who can be summoned into existence to meet this demand are manufactured software persons with robotic bodies, i.e., empathetic, autonomous robots with a physicality that mimics a flesh and blood person."*

* Martine Rothblatt, Virtually Human, 67 (2014)

Mortality…Immortality?

- Evangelists:
- Optimists:
- Pessimists:
- Realists:
- Transhumanists
- Immortalists
- Cryopreservationists
- Biologists, Medical Doctors

Transhumanism Immortality Bus

Immortalists

OBSERVATIONS

"Clearly, it is possible, through technology, to make death optional." Martine Rothblatt, Chairwoman, United Therapeutics

"The proposition that we can live forever is obvious. It doesn't violate the laws of physics, so we will achieve it." Arram Sabeti, CEO Cater

"I decided that I was just not going to die." Dave Aspray, CEO, Bulletproof

OUTCOMES

Biological Immortality (Joon Yun, Aubrey deGrey)

Digital Immortality (Ray Kurzweil, Martine Rothblatt)

ORGANIZATIONS

National Academy of Medicine

SENS Research Foundation

Unity Biotechnology

Google Calico

* Quotations from "Silicon Valley's Quest to Live Forever," The New Yorker, April 3, 2017.

Cryopreservationists

CRYOPRESERVATION ORGANIZATIONS

ALCOR LIFE EXTENSION FOUNDATION

- Not-for-Profit Founded 1972
- 190 Patients in Cryopreservation
- Whole Body Cryopreservation - $200,000

CRIONICS INSTITUTE

- Not-for-Profit Founded 1976
- 150 Patients in Cryostasis
- Whole Body Suspension - $28,000

Cryopreservation/Revival Trusts

PURPOSES

FUNDING FOR CRYOPRESERVATION, STORAGE OF DIGITAL MIND IMAGES

"During cryopreservation the Grantor will no longer be living, but the Grantor will nevertheless not be dead."

DISTRIBUTIONS

TO THE GRANTOR'S BIONIC ANALOG VERSION ("BAV")

"If multiple BAV's of the grantor are restored,

- Each is entitled to discretionary distributions
- Each may live rent free in any trust property."

TERMINATION

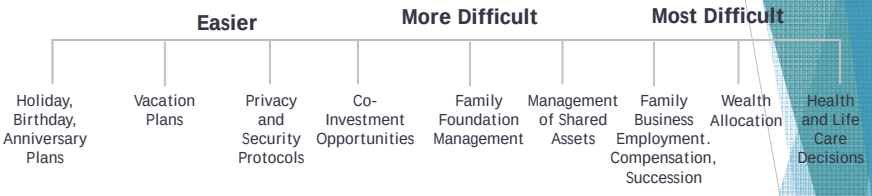
UPON THE GRANTOR'S REVIVAL

"Whether the grantor is revived in this world or another world."

"Upon revival the Grantor will be considered a different legal person."

How Will Families Collaborate and Make Decisions?

Family Issues Requiring Collaboration/Governance



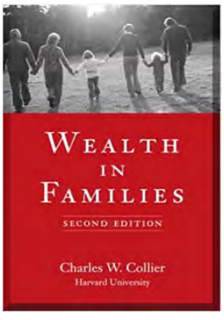
Changing Paradigm for Family Collaboration and Governance

TRADITIONAL FAMILIES	CONTEMPORARY FAMILIES
NUCLEAR FAMILY STRUCTURE	DIVERSE FAMILY STRUCTURES
AUTHORITY WITHIN HIERARCHY	NETWORKING, PARTICIPATION AND COLLABORATION UNDERGIRD AUTHORITY
CIRCUMSCRIBED COMMUNICATION	OPEN COMMUNICATION
CULTURAL HOMOGENEITY	CULTURAL DIVERSITY

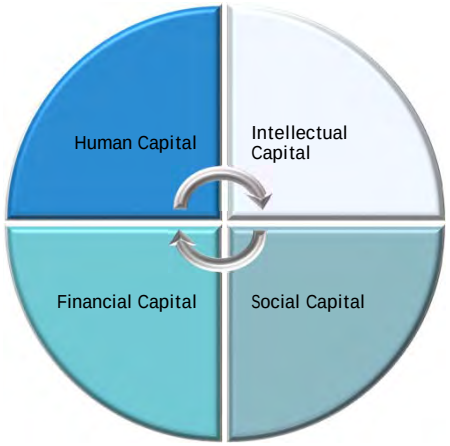
Developing a Holistic Understanding of Wealth

The most difficult challenges wealthy families face are not financial, but instead they are relationship based and family based.

Charles W. Collier

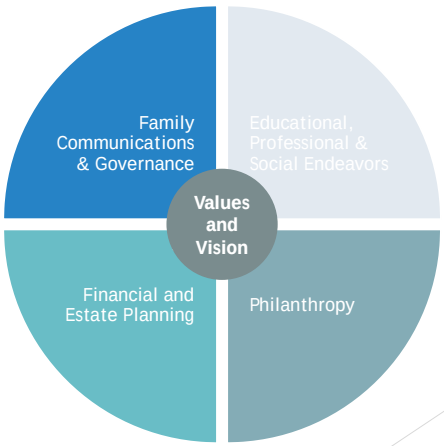


Family Wealth – Redefined*



- Charles W. Collier, Wealth in Families, Harvard University

Family Wealth In Action



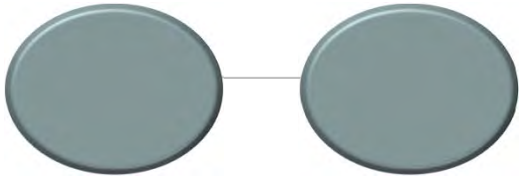
Family Collaboration and Decision Making

I	What's the Issue?
II	Who's Family?
III	Who's at the Table?
IV	Which Table?
V	Who Has Decision Rights?

Family Decision Making Continuum

Study	Kitchen Table	Dining Room Table	Conference Table	Board Room
Parental Control	Family Consensus	Family Compact	Family Council	Governance Structures
Children's Education Estate Planning for Minors	Social and Family Activities Rules of the Road for Family Communication Values Discussions	Estate Planning Health and Life Care Issues	Philanthropy Management of Shared Lifestyle Assets	Business and Entrepreneurial Endeavors, Asset Management Foundation Management

Changing Family Structures



Estate Planning and Trust Management for a Brave New World

We are such stuff
As dreams are made on;
And our little life
Is rounded with a sleep

Shakespeare, The Tempest, IV.i.

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ARTICLES

Janus as a Client: Ethical Obligations When Your Client Plays Two Roles in One Fiduciary Estate

*Karen E. Boxx**
*Philip N. Jones***

Is it possible for an attorney to have a conflict of interest when the attorney represents a trustee who is also a beneficiary of the trust? Is that situation similar to having two clients? What if the trustee is not only a beneficiary, but also a claimant against the trust? Since the trustee has three roles to play, is that situation similar to the attorney having three clients? The issue presented by these potential conflicts was one of the most vexing for the drafters of the Fifth Edition of the ACTEC Commentaries. The range of possible approaches goes from a requirement that a separate lawyer is needed for each role to a view that a client with multiple roles can rely on one lawyer. This article examines the various court and ethics opinions, considers the arguments for the different approaches, and recommends best practices for attorneys when their clients have such conflicts.

The Professional Responsibility Committee of the American College of Trust and Estate Counsel (ACTEC) faced many tough issues when drafting the Fifth Edition of the Commentaries to the Model Rules of Professional Conduct. One of the most difficult topics was the ethical duties owed by a lawyer whose client is both a fiduciary and a beneficiary of a trust or estate. It is axiomatic that clients may be juggling conflicting personal and professional interests with respect to situations for which they are obtaining legal advice. However, a lawyer's duty to avoid conflicts of interest under the Rules of Professional Conduct may constrain the lawyer's advice to such a client. This is particularly problematic in a trusts and estates practice, where the fiduciary client, who seeks the lawyer's advice on how to discharge the client's fiduciary duties, also seeks advice on the client's personal interest in the trust that may conflict with the other beneficiaries of the fiduciary es-

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tate. There are three potential responses to this scenario: (1) that there can be no conflict since the client is one person; (2) that the client must have separate representation for each separate role; and (3) that whether a lawyer may represent a client with respect to both roles depends on the circumstances. Previous editions of the Commentaries had not directly addressed the issue but had given somewhat vague advice appearing to follow the first approach. The Fifth Edition, which is the most recent edition and was approved by the ACTEC Board of Regents at its annual meeting in March 2016, moves toward the third position and gives some specific examples.

However, analysis of case law and ethics opinions from the various states indicate disagreement in how to approach this issue. When a lawyer is faced with this issue, it is critical that the lawyer's first step is determining whether her jurisdiction has addressed the lawyer's ethical responsibilities. The different contexts in which the question arises also can affect the answer. One context is in connection with the discipline of an attorney for violating the Rules of Professional Conduct. Another context is where a party moves to disqualify an opposing counsel because the opposing counsel has a conflict of interest when the attorney's client fills two or more roles. A third context is where an attorney is seeking court approval of attorney fees, and an opponent is objecting because the attorney has a conflict of interest due to the fact that the attorney's client fills two or more roles. A fourth context is when an attorney is sued for malpractice because the attorney has a conflict of interest.

The relative frequency of this issue arising and the uncertainty of the lawyer's duties create enough risk to lawyers to warrant caution. This article discusses the various decisions dealing with this issue as well as the Commentaries' advice and attempts to identify the most problematic scenarios. The authors of the article hold somewhat different views on the topic and intend to offer the differing viewpoints and arguments for and against those viewpoints, as well as giving authority and analysis to assist lawyers in confirming any controlling authority, drawing their own conclusions and in managing such conflicts in their own practices.

I. The ACTEC Commentaries Position

A. History of the Commentaries

The first edition of the ACTEC Commentaries was issued in 1993 and was authored primarily by Professor John Price of the University of

Washington Law School.[1] The purpose of the Commentaries was to address the concern that the Rules of Professional Conduct did not sufficiently consider the professional responsibilities of trust and estate practitioners. The Commentaries aimed to give particularized guidance to ACTEC Fellows and other lawyers with respect to the types of ethical situations encountered in a trust and estate practice, including questions relating to representation of a fiduciary.[2] A Second Edition of the Commentaries was issued in 1995, and in 1999 a Third Edition was published, together with a separate publication containing sample engagement letters.[3] The Fourth Edition was published in 2005, and the Fifth Edition was published in 2015.[4] A Second Edition of the sample engagement letters was approved in 2007 and a Third Edition was approved in 2017.[5] The ACTEC Foundation funded preparation and dissemination of the Commentaries and the Engagement Letters.

The Commentaries have been used by courts and state bar associations for both ethics opinions and disciplinary actions.[6] The approach of the Commentaries, however, is to give general guidance in applying the RPCs to a trust and estates practice and recommend best practices rather than to create corollary rules or pronounce certain practices as violations of the RPCs. Where it is particularly relevant, the Commentaries point out state variations, but generally, the Commentaries address primarily the text of the Model Rules.[7]

B. Previous Commentaries Editions' Position on Representation of the Fiduciary/Beneficiary

The Commentaries before the Fifth Edition did not directly address the issue of a fiduciary's multiple roles. However, in the commentary to Rule 1.7, the Fourth Edition stated,

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1 Am. Coll. Tr. & Estate Counsel, *ACTEC Commentaries on the Model Rules of Professional Conduct*, at 3 (5th ed. 2016), http://www.actec.org/assets/1/6/ACTEC_Commentaries_5th.pdf [hereinafter *ACTEC Commentaries*].

2 *See* John R. Price, *New Guidance on Ethics for Estate Planners,* 22 EST. PLAN. 17 (1995).

3 *ACTEC Commentaries*, *supra* note 1, at 6; Am. Coll. Tr. & Estate Counsel, *Engagement Letters: A Guide for Practitioners*, at 1 (3d ed. 2017), http://www.actec.org/assets/1/6/ACTEC_2017_Engagement_Letters.pdf.

4 *ACTEC Commentaries*, *supra* note 1, at 7, 9.

5 *ACTEC Engagement Letters*, *supra* note 3, at 1.

6 *See, e.g.*, Moore v. Anderson Zeigler Disharoon Gallagher & Gray, 135 Cal. Rptr. 2d 888, 901-02 (Cal. Ct. App. 2003); A v. B, 726 A.2d 924, 929 (N.J. 1999); Estate of Albanese v. Lolio, 923 A.2d 325 (N.J. Super. Ct. App. Div. 2007); *In re* Estate of Dawson, No. 51778-3-1, 2004 WL 2430120, at *4 (Wash. Ct. App. Nov. 1, 2004); Conn. Bar Ass'n., Informal Op. 15-07 (Oct. 2015); Ky. Bar Ass'n., Ethics Op. E-401 (Sept. 1997).

7 Price, *supra* note 2, at 18.

> Thus, a lawyer who represents the personal representative of a decedent's estate (or the trustee of a trust) should not also represent a creditor in connection with a claim against the estate (or trust). This prohibition applies whether the creditor is the fiduciary individually or another party.[8]

This language indicates a position consistent with the most conservative approach to the issue, that the lawyer may not represent the client in both the fiduciary and claimant roles, regardless of the circumstances. The Fourth Edition also gave the following example:

> Example 1.7-2. Lawyer (*L*) represents Trustee (*T*) as trustee of a trust created by *X*. *L* may properly represent *T* in connection with other matters that do not involve a conflict of interest, such as the preparation of a will or other personal matters not related to the trust. *L* should not charge the trust for any personal services that are performed for *T*. Moreover, in order to avoid misunderstandings, *L* should charge T for any substantial personal services that *L* performs for *T*.[9]

This example also implies that the lawyer must avoid the conflict. However, it would allow the lawyer to represent the trustee in matters that "do not involve a conflict of interest."

C. Fifth Edition Commentary on the Issue

In the ACTEC Professional Responsibility Committee's discussions on the issue, a conservative position that a lawyer should always avoid a conflict by not representing a fiduciary client in the client's individual capacity was considered too restrictive, particularly in light of common practice of representing a surviving spouse who is both fiduciary and beneficiary of the deceased spouse's estate.[10] The Fifth Edition added the following language to the commentary on RPC 1.7:

> *Representation of Fiduciary in Representative and Individual Capacities*
>
> Frequently a lawyer will be asked to represent a person in both an individual and a fiduciary capacity. A surviving spouse or adult child, for example, may be serving as executor while at the same time being a beneficiary of the estate, and may want

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[8] Am. Coll. Tr. & Estate Counsel, *ACTEC Commentaries on the Model Rules of Professional Conduct*, at 93 (4th ed. 2006) (on file with author).

[9] *Id.*

[10] UNIF. TRUST CODE § 802 cmt. (UNIF. LAW COMM'N 2000) ("For example, it is not uncommon that the trustee will also be a beneficiary."). Reports of the Professional Responsibility Committee's deliberations are based solely on Professor Boxx's recollections.

the lawyer to represent him or her in both capacities. So long as there is no risk that the decisions being or to be made by the client as fiduciary would be compromised by the client's personal interest, such a "dual capacity representation" poses no ethical problem. The easiest case would be where the client is the sole beneficiary of the estate as to which the client is the fiduciary. But even there, since a fiduciary owes duties to creditors of the estate, it is possible for a conflict to emerge. Given the potential for such conflicts, a lawyer asked to undertake such a dual capacity representation should explain to the client the nature of the fiduciary role and insist that the client execute an informed waiver of any right to have the lawyer advocate for the client's personal interest in a way that is inconsistent with the client's fiduciary duty. If the client is not willing to do this, the lawyer should decline to undertake the dual capacity representation. If such a dual capacity representation has been undertaken and no such waiver has been obtained, and such a conflict arises, the lawyer should withdraw from representing the client in both capacities.

In this situation, the question arises whether it is also necessary to obtain waivers from beneficiaries or others who are interested in the estate, but who are not the lawyer's clients. MR 1.7(a)(2) notes that "if there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to . . . a third person" then MR 1.7(b) must be complied with, including the duty to get informed consent found in MR 1.7(b)(4). Waivers from beneficiaries and other third parties do not seem called for by the rules, nor do they seem necessary or appropriate. First, MR 1.7(b)(4) only contemplates waivers from "affected client[s]." Second, as long as the lawyer has explained to the client his or her responsibilities to third persons, such as non-client beneficiaries or creditors, and obtained the requisite client waivers, this should allow the lawyer to honor those responsibilities consistent with representation of the client.

> Example 1.7-4 *X* dies leaving a will in which *X* left his entire estate in trust to his spouse *A* for life, remainder to daughter *B,* and appointed *A* as executor. *A* asked *L* to represent her both as executor and as beneficiary and to advise her on implications both to her and to the estate of certain tax elections and plans of division and distribution. *L* explained to *A* the duties *A* would have as personal representative, includ-

> ing the duty of impartiality toward the beneficiaries. *L* also described to *A* the implications of the common representation, to which *A* consented, including an informed agreement to forego any right to have the *L* advocate for *A*'s personal interest insofar as it conflicts with *A*'s duties as executor. *L* may properly represent *A* in both capacities. However, *L* should inform *B* of the dual representation and indicate that *B* may, at his or her own expense, retain independent counsel. In addition, *L* should maintain separate records with respect to the individual representation of *A*, who should be charged a separate fee (payable by *A* individually) for that representation. *L* may properly counsel *A* with respect to her interests as beneficiary. However, *L* may not assert *A*'s individual rights on *A*'s behalf in a way that conflicts with *A*'s duties as personal representative. If a conflict develops that materially limits *L*'s ability to function as *A*'s lawyer in both capacities, *L* should withdraw from representing *A* in both capacities. See MRPC 1.7 (Conflict of Interest: Current Clients) and MRPC 1.16 (Declining or Terminating Representation).
>
> Example 1.7-5 *X* dies, leaving a will giving *X*'s estate equally to his three children. Child *A* was appointed executor. *A* engages *L* to represent her as executor. A dispute arises among the three children over distribution of *X*'s tangible personal property, and *A* asks *L* to represent her in resolving the dispute with her siblings. Depending on how the dispute progresses, *L* may need to advise *A* to obtain independent counsel to represent her in the dispute. In addition, *L* may need to advise *A* to resign as executor if the dispute gives rise to an actual conflict with her fiduciary duties.[11]

In other words, the Commentaries now take the position that representing a client as both fiduciary and beneficiary can be done but depending on the circumstances, there may be an insurmountable conflict.

II. The Client's Conflict

It is important to note that a fiduciary is generally not subject to the same prohibition on conflicts of interest to which attorneys are subject. For example, a conflict of interest on the part of a trustee is not necessarily grounds for removal. Often the trustee is also one of several beneficiaries of the trust, yet the trustee is allowed to serve, as pointed out in

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[11] *ACTEC Commentaries*, *supra* note 1, at 107-08.

the official comments to section 802 of the Uniform Trust Code. A comment to the Third Restatement of Trusts, section 37, states:

> Thus, the fact that the trustee named by the settlor is one of the beneficiaries of the trust, or would otherwise have conflicting interests, is not a sufficient ground for removing the trustee or refusing to confirm the appointment. This is so even though the trustee has broad discretion in matters of distribution and investment.[12]

However, in some cases the conflict of interest is so fundamental that removal of the fiduciary is warranted. In *Wharff v. Rohrback*,[13] one of the duties of the personal representative was to consider suing herself for causing the wrongful death of the decedent. The court held that the personal representative should be removed because that conflict was sufficiently substantial to justify removal.[14] But when such a fundamental conflict was not present, courts have declined to remove the personal representative, even when the personal representative served in two roles.[15]

A trustee does not have a conflict of interest merely because a trustee must balance the conflicting interests of the various beneficiaries. The Third Restatement of Trusts, section 90, comment c, states:

> Unlike the financial and other personal interests of the trustee, the divergent economic interests of trust beneficiaries give rise to conflicts of types that cannot simply be prohibited or avoided in the investment decisions of typical trusts. These problems regularly present the trustee with problems of conflicting obligations to diverse beneficiaries. . . . The interests of a life-income beneficiary, for example, are almost always inherently in competition with those of the remainder beneficiaries, especially in light of the risks of inflation; and the different tax circumstances of the various beneficiaries frequently create competing investment preferences, among concurrent as well as successive beneficiaries. . .

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12 RESTATEMENT (THIRD) OF TRUSTS § 37 cmt. f(1) (AM. LAW INST. 2003).

13 952 P.2d 87, 89-90 (Or. Ct. App. 1998).

14 *Id.* at 90. Other Oregon cases have held that a personal representative with such a fundamental conflict of interest warranted removal. *See, e.g.*, *In re* Estate of Elder, 83 P.2d 477, 479 (Or. 1938); *In re* Estate of Faulkner; 65 P.2d 1045, 1047 (Or. 1937); Bean v. Pettengill, 109 P. 865, 865 (Or. 1910); *In re* Estate of Vander Galien 614 P.2d 127, 128 (Or. Ct. App. 1980).

15 *E.g.*, Roley v. Sammons, 170 P.3d 1067, 1073 (Or. Ct. App. 2007), *review denied*, 174 P.3d 1016 (Or. 2007); *see also* Schaad v. Lorenz, 688 P.2d 1342, 1350 (Or. Ct. App. 1984).

> These conflicting fiduciary obligations result in a necessarily flexible and somewhat indefinite duty of impartiality. The duty therefore requires the trustee to balance the competing interests of differently situated beneficiaries in a fair and reasonable manner.[16]

Similarly, section 79(1)(a) of the Third Restatement notes that trustees should take into account the differing interests of the beneficiaries, noting that the trustee has a duty to administer the trust "impartially and with due regard for the *diverse* beneficial interests created by the terms of the trust."[17] Thus, if one beneficiary has received property from the trust to which the beneficiary was not entitled, that beneficiary can be required to repay the funds, or "his beneficial interest is subject to charge for the repayment thereof, unless he has so changed his position that it is inequitable to compel him to make repayment."[18] Such a charge is often referred to as an offset. The Uniform Trust Code is silent on the subject of offsets, but the *Arken* case indicates that the right of offset is nevertheless available to a trustee.[19] Moreover, UTC section 816(18) permits a trustee to lend money to a beneficiary, and may collect such loans by offsetting the loan amount from future distributions to the beneficiary.

The Restatement (Second) of Trusts, section 255, agrees: "If the trustee makes an advance or a loan of trust money to a beneficiary, the beneficiary's interest is subject to a charge for the repayment of the amount advanced or lent."[20] Comment (f) to that section states that a spendthrift clause does not change that result: "Although the interest of the beneficiary is not transferable by him or subject to the claims of creditors, his interest is subject to a charge for advances made to him out of the trust property unless the trustor has manifested a different intention."[21]

The application or enforcement of that offset does not create an impermissible conflict of interest for the trustee. The trustee has a fiduciary obligation to deal fairly with diverse beneficial interests, even if that action benefits the interests of one beneficiary and harms the interests of another: "[A] trustee's obligations are not met simply by maximizing current allocations to beneficiaries – and certainly not to one

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16 RESTATEMENT (THIRD) OF TRUSTS § 90 cmt. c.

17 *Id.* § 79(1)(a) (emphasis added).

18 Arken v. City of Portland, 263 P.3d 975, 1006 (Or. 2011) (quoting RESTATEMENT (SECOND) OF TRUSTS § 254 (AM. LAW INST. 1959)).

19 *Id.* at 996 (citing PERB's Cross-Motion for Summary Judgment as the source of their contention, which mentions offsetting amounts owed to trustees).

20 RESTATEMENT (SECOND) OF TRUSTS § 255 (AM. LAW INST. 1959).

21 *Id.* at cmt. f; King v. King, 434 P.3d 502, 510 (Or. Ct. App. 2018).

group of beneficiaries. A trustee has a duty of impartiality and, 'with respect to the various beneficiaries of the trust,' must administer the trust 'impartially and with due regard for the *diverse* beneficial interests created by the terms of the trust.'"[22]

Similarly, a trustee does not have an impermissible conflict of interest merely because the trustee is able to determine the trustee's compensation and to pay that compensation from the trust. Obviously, a conflict exists between the trustee and the trust (or the beneficiaries) every time a fee is determined and paid from the trust, but that fact does not restrict the ability of the trustee to be compensated, if the compensation is fair.[23] Thus, reasonable trustee compensation does not create an impermissible conflict.[24]

III. The Three Approaches to the Issue of Multiple Client Roles

A. Introduction

In contrast to fiduciaries, attorneys must be much more willing to eliminate potential conflicts of interest. In general, attorneys should not represent a fiduciary while simultaneously representing one or more separate parties who are beneficiaries. Whenever communicating with beneficiaries, the trustee's attorney must avoid giving a beneficiary the impression that the trustee's attorney also represents the beneficiaries; for that reason, it would be helpful to frequently remind the beneficiaries that the trustee's attorney represents only the trustee, and not any of the beneficiaries.[25]

Having established that fiduciaries are generally allowed to have conflicts of interest, while attorneys are not, we turn now to the main question at hand: May one attorney represent one fiduciary who has additional, conflicting roles? There are three potential answers to this question: (1) the client must have separate representation for each conflicting role; (2) the client is one person and therefore may be represented by one attorney in all roles; and (3) the lawyer can represent the client in all roles, unless there is an actual conflict that limits the lawyer's ability to represent the client competently and diligently.

The starting point of our analysis is the general rule that an attorney should not represent a fiduciary while simultaneously also repre-

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22 White v. Pub. Emp. Ret. Bd., 268 P.3d 600, 608-09 (Or. 2011) (quoting Restatement (Third) of Trusts § 79(1)(a)) (emphasis added).

23 Unif. Trust Code § 802(h)(2) (Unif. Law Comm'n 2010).

24 *See* Restatement (Third) of Trusts § 78 cmt. c(4) (Am. Law Inst. 2007).

25 *ACTEC Commentaries*, *supra* note 1, at 36.

senting a *different* person who is a beneficiary, particularly when the beneficiary's interests are adverse to the fiduciary.[26]

All editions of the Commentaries have included an example that somewhat undercuts this general rule:

> Example 1.7-3. Lawyer (*L*) represented Husband (*H*) and Wife (*W*) jointly with respect to estate planning matters. *H* died leaving a will that appointed Bank (*B*) as executor and as trustee of a trust for the benefit of *W* that meets the QTIP requirements under I.R.C. 2056(b)(7). *L* has agreed to represent *B* and knows that *W* looks to him as her lawyer. *L* may represent both *B* and *W* if the requirements of MRPC 1.7 are met. If a serious conflict arises between *B* and *W*, *L* may be required to withdraw as counsel for *B* or *W* or both. *L* may inform *W* of her elective share, support, homestead or other rights under the local law without violating MRPC 1.9 (Duties to Former Clients). However, without the informed consent of all affected parties confirmed in writing, *L* should not represent *W* in connection with an attempt to set aside *H*'s will or to assert an elective share.[27]

The Commentaries also state that "[u]nder some circumstances it is acceptable for the lawyer also to represent one or more of the beneficiaries of the fiduciary estate, subject to the fiduciary client's overriding fiduciary obligations."[28] Previous versions of the Commentaries stated that such representation was "appropriate" but the Fifth Edition changed the adjective to "acceptable," weakening the endorsement of the practice.

California courts have also acknowledged that it is possible to represent a fiduciary and a beneficiary. "Whether the attorney for an administrator of an estate may act for one of the heirs as against the other heirs in an adversary proceeding relating to the property of the estate depends on the circumstances of the particular case, and whether there is any conflict between the interests of the estate and those of the heir in respect of the matter involved."[29] In *In re Estate of Healy*,[30] the court held that the attorney for an executor did not violate any duty to the executor by also serving as the attorney for an heir in a dispute with

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26 *See* Potter v. Moran, 49 Cal. Rptr. 229, 231 (Cal. Dist. Ct. App. 1966); Va. Legal Ethics Op. 1720 (1998).

27 *ACTEC Commentaries*, *supra* note 1, at 104.

28 *Id.* at 39.

29 Morales v. Field, DeGoff, Huppert & MacGowan, 160 Cal. Rptr. 239, 245-46 (Cal. Ct. App. 1979), (citing McCabe v. Healy, 70 P. 1008 (Cal. 1902); Fairchild v. Bank of Am., 13 Cal. Rptr. 491 (Cal. Ct. App. 1961)).

30 70 P. 455 (1902).

other heirs in which the administrator had no interest. The court stated that the dispute "is in effect a suit to determine a controversy between different heirs as to their respective rights of inheritance, and in such a controversy it is well settled that the administrator has no interest, but is a mere officer of the court, holding the estate as a stakeholder, to be delivered to those whom the court shall decide to be entitled thereto."[31] There are therefore exceptions to the general rule against representing both a fiduciary and one of the beneficiaries, but those exceptions are very fact specific and require that no actual conflict exists.

The more difficult issue, addressed in this article, is whether the attorney may represent a fiduciary while simultaneously representing the *same* person as beneficiary.

To contend that an attorney may represent a party who has two roles is not to say that an attorney may represent co-trustees who have differing interests. An attorney may not represent co-trustees if their interests differ.[32] Co-trustees are often a source of conflicts; because of the possibility of conflicts, the most cautious approach would be to represent only one of the co-trustees. If, for example, the co-trustees are siblings who have a long history of compatibility, an attorney might be able to represent all of the co-trustees, but that attorney will need to keep a very close watch for any conflicts, and if a conflict develops the attorney will likely need to resign from further representation of any of the co-trustees. That same approach should be taken when an attorney is asked to represent two or more beneficiaries. In either instance, the attorney is generally not permitted to keep confidences of one client from the other client.[33] Both clients should be informed in advance that any communication with the attorney and one of the clients will be shared with the other client. If a confidential matter or a conflict develops, the attorney will likely be required to resign from further representation of either person.

B. The Conservative Approach: Client Must Have Separate Representation for Each Role

The most conservative approach is the position apparently taken in the earlier versions of the Commentaries, that a lawyer cannot advise a client both as to the client's fiduciary role and the client's individual interests as a beneficiary. Under this interpretation, the client's conflict between her duties as fiduciary and her personal interests in the estate is imputed to the lawyer, and this makes it impossible for the lawyer to

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31 *Id.* at 477.

32 *In re* Estate of Marks, 569 N.E.2d 1342, 1350 (Ill. App. Ct. 1991); *In re* Disciplinary Action Against McIntee, 833 N.W.2d 431, 433 (N.D. 2013).

33 *ACTEC Commentaries*, *supra* note 1, at 84.

advise the client. In *Smith v. Jordan*,[34] for example, a Connecticut court noted that the lawyer representing the administrator in requesting construction of the Will also represented the administrator and his brother as claimants under the will, and stated that "undoubtedly no harm was done or intended; but sound policy forbids such a practice, and . . . counsel who appear for the executor or trustee in cases brought for the construction of wills ought not to appear and act for legatees and devisees under the will."[35]

RPC 1.7 states:

> Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Neither the rule nor its official comments contemplate the circumstance where the lawyer may represent one person with respect to more than one role in the transaction. In order to conclude that the client with dual roles presents a potential conflict, the term "client" would need to be interpreted as "client with respect to a particular role." As stated by a Connecticut state court, "[a]s a reasonable extrapolation, this court finds that this rule of law, which applies to two clients with adverse interests, should also apply to one client represented in a dual capacity with adverse interests."[36]

The definition of concurrent conflict includes the situation where there is a significant risk that the representation of one client will be materially limited by the lawyer's responsibilities to another client or a third person. Representation of a fiduciary arguably creates duties owed to the beneficiaries of the fiduciary estate. The extent of a fiduciary's lawyer's duties to the beneficiaries varies among jurisdictions and among the type of fiduciary. The Commentaries acknowledge that the lawyer owes some duties to the beneficiary, depending on the circumstances:

> *Duties to Beneficiaries.* The nature and extent of the lawyer's duties to the beneficiaries of the fiduciary estate may vary ac-

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34 59 A. 507 (Conn. 1904).

35 *Id.* at 508.

36 Frank v. Estate of Frank, No. 66226, 1992 WL 394682, at *5 (Conn. Super. Ct. Dec. 22, 1992).

> cording to the circumstances, including the nature and extent of the representation and the terms of any understanding or agreement among the parties (the lawyer, the fiduciary, and the beneficiaries). The lawyer for the fiduciary owes some duties to the beneficiaries of the fiduciary estate although he or she does not represent them. The duties, which are largely restrictive in nature, prohibit the lawyer from taking advantage of his or her position to the disadvantage of the fiduciary estate or the beneficiaries. In addition, in some circumstances the lawyer may be obligated to take affirmative action to protect the interests of the beneficiaries. The beneficiaries of a fiduciary estate are generally not characterized as direct clients of the lawyer for the fiduciary merely because the lawyer represents the fiduciary generally with respect to the fiduciary estate.[37]

Courts have imposed duties on the fiduciary's lawyer in particular circumstances. For example, in *Pederson v. Barnes*,[38] the Alaska court upheld a malpractice verdict against a guardian's attorney where the guardian client had stolen almost all of the ward's property. The court relied on the Restatement of the Law Governing Lawyers section 51 and comment h. Under that standard, said the court, an attorney for a guardian owes a duty of care to a minor ward if the lawyer "knows that appropriate action by the lawyer is necessary . . . to prevent or rectify the breach of a fiduciary duty owed by the client to the nonclient."[39] Similarly, in *Janssen v. Topliff (Guardianship of Karan),*[40] the Washington court held that the attorney for the guardian of a minor ward owes a direct duty of care to the guardian's ward and could be liable in malpractice for failing to ensure that guardian either posted a bond or deposited guardianship proceeds in a blocked account.[41]

In *Charleson v. Hardesty*,[42] the beneficiaries of a trust sued the lawyer who allegedly represented the trustee. The Supreme Court of Nevada stated that "when an attorney represents a trustee in his or her capacity as trustee, that attorney assumes a duty of care and fiduciary duties toward the beneficiaries as a matter of law. In the present case if

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37 *ACTEC Commentaries*, *supra* note 1, at 39 (commentary on RPC 1.2).

38 139 P.3d 552 (Alaska 2006).

39 *Id.* at 557 (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51).

40 38 P.3d 396 (Wash. Ct. App. 2002).

41 *See In re* Estate of Treadwell, 61 P.3d 1214, 1217 (Wash. Ct. App. 2003) (citing Janssen v. Topliff (Guardianship of Karan), *supra* note 40) (duty of care owed directly to the ward by the lawyer for the guardian of an incapacitated adult).

42 839 P.2d 1303 (Nev. 1992).

[Defendant Lawyer] was the attorney for the trustee, we conclude that he owed the [Plaintiff Beneficiaries] a duty of care and fiduciary duties."[43]

In an Arizona case, *Estate of Shano*,[44] the court held that an attorney should be disqualified, and his fees disallowed, because the attorney had a conflict of interest when his ethical obligations to his client, the executor, conflicted with the duties of fairness and impartiality that the executor owed to the surviving spouse, a beneficiary. The court reasoned that the duties of the attorney for the executor were "congruent" with the fiduciary duties the executor owed to the surviving spouse.[45] The holding in that case was limited seven years later when the same court held that the duties of fairness and impartiality that the executor owes to beneficiaries do not result in the beneficiaries becoming clients of the executor's attorney.[46]

Under an interpretation that the fiduciary's lawyer owes duties to the beneficiaries, representation of a client in both their fiduciary and beneficiary role could create a concurrent conflict because of the duties owed to the other beneficiaries.[47]

A conflict could also be found if the "client" as identified in the rule may be the estate or trust rather than the fiduciary. As stated in the comments to RPC 1.7,

> In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.[48]

In a jurisdiction where the fiduciary estate is considered the client rather than the fiduciary, it is more likely that a court or disciplinary committee will find a conflict of interest in representing the fiduciary with respect to his or her individual interests.

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43 *Id.* at 1306-07.

44 *In re* Estate of Shano, 869 P.2d 1203 (Ariz. Ct. App. 1993).

45 *Id.* at 1208.

46 *In re* Estate of Fogleman, 3 P.3d 1172, 1177 (Ariz. Ct. App. 2000).

47 *See* Daniel R. Nappier, *Blurred Lines: Analyzing an Attorney's Duties to a Fiduciary-Client's Beneficiaries,* 71 WASH. & LEE L. REV. 2609, 2648 (2014).

48 MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt (AM. BAR ASS'N 1983). The Reporter's Note to the First Edition of the ACTEC Commentaries noted that the majority rule was that "a lawyer who represents a fiduciary generally with respect to a fiduciary estate stands in a lawyer-client relationship with the fiduciary and not with respect to the fiduciary estate or the beneficiaries. *ACTEC Commentaries*, *supra* note 1, at 2.

For example, in *Gagliardo v. Caffrey*,[49] an Illinois case, a brother and sister each owned 47.5% of a family company, with the mother owning the remaining 5%. The brother's estate plan left his estate to his wife and minor children but named the sister as executor and trustee. The brother died in an automobile accident while driving a car owned by the family company. An attorney did some legal work regarding the potential wrongful death claim, and stated that he represented the sister personally as well as the estate of the brother. The wife sued the sister for breach of fiduciary duty (including trying to buy out the estate's interest in the company at a deep discount). The lawyer represented the sister individually in this suit, and the wife moved to disqualify the attorney. The grounds for disqualification were based on RPC 1.9, prohibiting an attorney who has formerly represented a client in a matter from later representing another person in the same or substantially related matter in which the new client's interests are materially adverse to the interests of the former client. The court viewed the client of the prior representation on the wrongful death claim as the estate, rather than the sister as executor. "The adversarial situation here arose instead from a divergence of the estate's interests, which cannot be delineated from those of the sole beneficiary, and the interests of [the family business]. . . . Therefore, the conflict alleged is between the estate and the executor, whose individual interests would benefit from an action detrimental to the estate."[50] The court further stated that because the wife was the sole beneficiary, "under the narrow circumstances of this case, we conclude that, for the time [the lawyer] represented the estate, he represented [the wife]."[51] So under the court's application of RPC 1.7, the wife was considered the former client. The court went on to determine whether the attorney could have obtained confidential information about the estate when he was involved as the estate's attorney that would be relevant to the wife's action against the sister. The court said it was enough to show that confidential information "could have been" communicated, and upheld the trial court's disqualification of the attorney.[52]

In another Illinois case, *Estate of Hudson v. Tibble*,[53] the decedent left a spouse as well as a son from a previous marriage. There was a dispute over a business that the surviving spouse claimed was owned 100% by her. The son argued that the business was included in his father's estate, which would give him a 50% ownership. The spouse had

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49 800 N.E.2d 489 (Ill. App. Ct. 2013).

50 *Id.* at 496.

51 *Id.* at 497.

52 *Id.* at 498.

53 99 N.E.3d 105 (Ill. App. Ct. 2018).

been appointed executor and hired a lawyer to represent her as executor. The son moved to remove the spouse as executor, and the lawyer defended her in those actions. Eventually, the spouse agreed to resign and an independent executor was appointed. The lawyer continued to represent the spouse in her individual capacity. The new executor and the son then sued the lawyer for malpractice. They alleged that the lawyer also represented the business. The spouse also sued the lawyer for malpractice. The court first noted that Illinois law holds that an attorney hired by an estate representative owes a duty to the estate:

> [I]t seems axiomatic to this court that when an attorney is retained by an administrator for the purpose of administering the estate, its client is in actuality the administrator and the estate due to the symbiotic nature of their concurrent existence. The administrator only acts to serve the estate, and the estate cannot act but through the name of the administrator. Thus, we find the attorney-client relationship between an attorney and an estate to be inherent when the attorney is retained to assist in the administration of the estate.[54]

The court noted that the engagement letter was not clear as to whether the lawyer was representing the spouse as executor or whether the purpose was to advance her personal interests in the estate. The lawyer advocated for the spouse's position that the company was hers alone. But the lawyer also filed documents on behalf of the estate. The court reversed the trial court granting of the lawyer's summary judgment motion, because "here, an adversarial situation arose regarding ownership of the bus company, which should have resulted in defendants' first and only allegiance being to the Estate."[55] The court also quoted from another opinion that "an attorney representing an estate must give his first and only allegiance to the estate when . . . an adversarial situation arises."[56]

In both *Gagliardo* and *Estate of Hudson,* there were significant conflicts between the estate's interests and the executor's personal interests, so it is difficult to judge whether a court would be more forgiving if the conflict were more benign.[57]

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[54] *Id.* at 114.

[55] *Id.* at 116.

[56] *Id.* (quoting *In re* Estate of Kirk, 686 N.E.2d 1246, 1250 (Ill. App. Ct. 1997)).

[57] In two cases, an attorney who was representing one person who was serving in two roles stipulated to the presence of a conflict of interest on the part of the attorney. One was an Ohio case, in which the attorney was suspended for six months after he stipulated to a conflict of interest caused by his simultaneous representation of an executor in her fiduciary capacity and in her individual capacity, when her siblings accused her of misappropriating estate assets. Because the matter was stipulated, the issue of the

A Minnesota court took a similar position in *Estate of Peka*.[58] In that case, the decedent was survived by his minor child and his ex-wife. The estate was left to the minor child with the decedent's sister as trustee. The will included a provision that the ex-wife and her mother would never be allowed to live in his home. The ex-wife filed an action to be able to purchase the home, either in her own name or as conservator for the minor child. She also contested the estate's position on using life insurance to pay child support arrears. The same law firm represented the ex-wife individually and as conservator for the child. She argued the firm had no conflict because they represented only her, but the court distinguished her from the conservatorship and noted there were actual conflicts between her individual interests and those of the conservatorship.[59] She was required to hire separate counsel for the conservatorship.[60]

The North Carolina disciplinary authorities and courts have taken a strict view on the issue. In a 1987 ruling,[61] the North Carolina Bar's Ethics Committee was asked whether a lawyer could represent a surviving spouse as executor and in her individual capacity. The spouse's deceased husband's estate had two contested creditor claims that also made claims against the surviving spouse individually. One creditor was attempting to collect a debt owed jointly by husband and the surviving spouse. The second creditor was the first wife, who was claiming the estate owed money to her and her minor children pursuant to a separation agreement. Both of the creditors sought costs from second wife in her capacities as personal representative and individually. The surviving spouse who was the personal representative engaged one attorney to represent her in both claims. The North Carolina State Bar ruled that one attorney cannot represent the surviving spouse in her two capacities

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conflict was not contested or litigated. Cin. B. Ass'n. v. Robertson, 49 N.E.3d 284, 285 (Ohio 2016). In the second case, a 2001 Washington disciplinary case, a lawyer was disciplined for representing a client both as executor of an estate and in her individual capacity claiming a bank account that was the major asset of the estate. The client claimed that she was added as owner to the bank account during her father's life, and the other beneficiaries contested her claim. That ruling is of limited assistance because the attorney stipulated to the presence of a conflict, and thus that issue was not discussed in any detail. *Discipline Notice: Thomas Robinson*, WASH. BAR ASS'N (May 4, 2001), https://www.mywsba.org/PersonifyEbusiness/Default.aspx?TabID=1541&dID=436 (last visited May 17, 2019).

58 *In re* Estate of Peka, No. A07-147, 2008 WL 467425 (Minn. Ct. App. Feb. 12, 2008).

59 *Id.* at *5.

60 *Id.*

61 N.C. State Bar, *Representation of Administratrix in Official and Individual Capacities*, Formal Ethics Op. 22 (Apr. 17, 1987), https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-22/.

because "there are conflicts between her interests in the two roles."[62] The opinion indicated a treatment of the estate as the client, and went even further, stating that the conflict would have to be waived by the first wife and the minor children.[63]

A 1992 ethics opinion made a similar conclusion.[64] An attorney was retained to represent the personal representative of an estate. The personal representative was accused of misappropriating assets. The personal representative resigned and was being sued by the successor personal representative. The attorney represented the original personal representative in defending against the suit. The North Carolina Bar ruled that the attorney had represented the personal representative in her fiduciary capacity and had also represented the estate as an entity, and thus the attorney could not take a position against the former client — the estate — when the interests of the former client are adverse to the current client — the former personal representative — unless the estate consented.[65] The successor personal representative then moved the court to disqualify the attorney due to a conflict of interest.

A North Carolina appellate court also followed this approach, affirming a trial court ruling that an attorney should be disqualified from representing an executor in her capacity as executor and in her individual capacity, when the executor/individual was accused of removing assets from the estate.[66] This was not an ethics disciplinary action; instead, it was a ruling on a motion to disqualify the attorney from continuing to represent the client in her two roles. The appellate court found that the granting of the disqualification motion was a discretionary act by the trial court, and that the trial court had not abused its discretion when it granted the disqualification motion.[67] The appellate court did not necessarily conclude that the ethics rules had been violated, but the court cited both the rules of professional conduct and the ethics opinions cited above.[68] The language of the opinion indicated that the court considered the estate as a separate client.[69]

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62 *Id.*

63 *Id.*

64 N.C. RULES OF PROF'L CONDUCT Op. 137 (Oct. 23, 1992). The opinions issued before 1997 were decided under a prior version of the rules of professional conduct.

65 *Id.*

66 Williams v. Williams, 746 S.E.2d 319 (N.C. Ct. App. 2013).

67 *Id*.

68 *Id*. at 323.

69 *Id*. at 321 (stating "Plaintiffs asserted that the nature of this representation created a conflict of interest between two current clients of [the lawyer] – or between a current and a former client, depending on whether Harrington continued to represent the [estate] through representation of Defendant in her capacity as administratrix.").

These cases and rulings, and the text of the rule, lend support to the view that representation of a client in both fiduciary and beneficiary capacities is a conflict of interest for the attorney. Even with the strict view, there are circumstances where there is no conflict, such as where the client is the sole beneficiary of the estate. Certainly an attorney can represent a fiduciary who is also a beneficiary where the beneficiaries are not in conflict and the client is not asking for assistance with individual concerns. However, particularly in jurisdictions that would consider the estate or trust the client, representing the fiduciary's individual interests that diverge from the interests of the other beneficiaries can be considered a conflict under RPC 1.7(b)(1), a matter that is directly adverse to another client. In jurisdictions where some duty to the beneficiary is inferred when the lawyer represents the fiduciary, a conflict can be found under RPC 1.7(b)(2), that prohibits representation where duties to a third person may materially limit representation. Conflicts under RPC 1.7(b)(2) may require more facts indicating an actual conflict than conflicts under RPC 1.7(b)(1).

C. The One Client One Lawyer Approach: Lawyer Can Represent the Client in Both Roles

In Oregon and in a few other states, the answer is that the attorney cannot have a conflict of interest if he or she represents one client who has two roles; the attorney nevertheless has only one client.[70] If the client has three roles, the answer is the same. In each case, the duty of the attorney is to advise the one client how to balance that one client's various interests. The client has conflicting interests, but the attorney does not have conflicting clients.

The fact that the trustee is also one of the beneficiaries does not require that person to retain two attorneys: one to represent the person as the trustee, and one to represent the person as a beneficiary. That one person needs only one attorney, and the attorney will not have a conflict of interest simply because the one client has a conflict of interest, or plays two conflicting roles. The Oregon State Bar has stated,

> It follows that when Lawyer A represents Widow as an individual and Widow in her capacity as personal representative, Lawyer A has only one client. Alternatively stated, the fact that Widow may have multiple interests as an individual and as a

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[70] *See* Oregon State Bar, *Conflicts of Interest, Current Clients: Fiduciaries*, Formal Op. No. 2005-119, at 2 (Aug. 2005), https://www.osbar.org/_docs/ethics/2005-119.pdf. Note that in 2005 and 2006, the OSB Ethics Committee re-wrote and re-published many of the prior Formal Ethics opinions. As a result, Opinions 1991-119 and 2005-119 are essentially the same opinion, but the latter opinion has citations to the more recent version of the rules.

> fiduciary does not mean that Lawyer A has more than one client, even if Widow's personal interests may conflict with her obligations as a fiduciary. Representing one person who acts in several different capacities is not the same as representing several different people. Consequently, the current-client conflict rules in Oregon RPC 1.7 do not apply to Lawyer A's situation.[71]

In short, the Oregon approach relies heavily on the fact that RPC 1.7 is based on the possibility that a conflict might exist between *two* clients of the same attorney. RPC 1.7(a)(1) finds a conflict to be present when "the representation of *one* client will be directly adverse to *another* client."[72] RPC 1.7(a)(2) is similarly worded, referring to the interests of one or more clients conflicting with the interests of *another* client. Thus, the rule clearly contemplates a conflict among two or more clients, not a conflict within the roles of just one client.

Two cases indicate that California may have opted to follow this approach. In *Baker Manock & Jensen v. Salwasser*,[73] the court allowed an attorney to represent a client with dual capacities after finding there was no conflict. It was an attorney disqualification case in which an executor named George was also a beneficiary of the estate. George was represented by one law firm, but his position in the litigation as executor was the same as his position as beneficiary. The court stated, "Thus, even if the law firm were viewed as representing 'two Georges' who at least in theory, could have conflicting interests . . . , in the case before us, there is no divergence of the interests of George as executor and George as beneficiary. Accordingly, there is no conflict of interest in representing both the executor and the beneficiary."[74]

Also in California, in *Estate of Buoni,*[75] an attorney represented an executor who was also a creditor of the estate. When an opponent moved to disqualify the attorney due to an alleged conflict of interest, the court concluded that the client had a conflict, but the attorney did not. The court noted that under California probate statutes, claims submitted by an executor must be reviewed by the probate court, thus offering an additional layer of protection. The court held:

> In applying the above standards here, the identity of the client must first be determined. Only one individual is involved, i.e.,

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71 *Id.* at 2-3 (citations omitted).

72 OR. RULES OF PROF'L CONDUCT r. 1.7(a)(1) (OR. STATE BAR 2018) (emphasis added).

73 96 Cal. Rptr. 3d 785 (Cal. Ct. App. 2009).

74 *Id*. at 787.

75 *In re* Estate of Buoni, No. F048163, 2006 WL 2988737 (Cal. Ct. App. Oct. 20, 2016).

> respondent. However, does respondent, as personal representative and creditor, become two clients for purposes of rule 3-310(C)?
>
> The attorney for a personal representative represents the fiduciary alone, not the estate. An estate is neither a legal entity nor a natural or artificial person. Accordingly, respondent, as a personal representative and as a creditor, is only one client. As respondent's attorney, [the attorney] does not represent either the estate or appellant as a beneficiary.
>
> Nevertheless, there still remains the question of whether the representation of one client in these two capacities violates rule 3-310(C). In other words, is [the attorney] disloyal to respondent as the personal representative by also representing respondent as a creditor of the estate and vice versa? The answer clearly is "no." Logically, where only one person is the client, the attorney is not dividing his or her loyalty between two or more clients. [The attorney] remains in a position to be loyal to respondent's interests alone. Thus, this case is distinguishable from the situation where an attorney for a corporation, who as corporate counsel represents the corporation's officers in their representative capacity, also attempts to represent a corporate officer personally. In that case, the attorney acquires a conflict of interest with the corporation, a separate legal entity to whom the attorney owes a separate duty of loyalty.
>
> This is not to say that no conflict of loyalties may exist in this case. However, it is respondent (the personal representative) who has the conflict, i.e., a personal interest in a claim against the estate that he is administering, not his attorneys. . . .
>
> In fact, if it were concluded that [the attorney] was disqualified, respondent would be in the untenable position of having to employ two separate attorneys to avoid the identical situation.
>
> In sum, in representing respondent, [the attorney] represents only one client. Further, the interests of the estate and the beneficiaries are protected by the section 9252 procedure. Accordingly, disqualification of [the attorney] is not required.[76]

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[76] *Id.* at *2-3 (citations omitted).

D. The Compromise Approach: Lawyer Can Represent the Client in Both Roles Unless There is an Actual Conflict

When drafting the Fifth Edition, the ACTEC Professional Responsibility Committee moved away from the more conservative, simplistic approach of previous editions and took this more pragmatic approach because the realities of practice frequently put a lawyer in a "conflict" when there is little danger of actual conflict. The most common scenario is the estate where the surviving spouse is the executor as well as the lifetime beneficiary of trusts under the decedent's Will. The surviving spouse can be faced with a number of decisions both as executor and as beneficiary, and will look to the lawyer for advice on those decisions. Those decisions could have effects on the remainder trust beneficiaries and other beneficiaries. If those beneficiaries are children of the surviving spouse or are otherwise in agreement with the surviving spouse, the lawyer should be able to advise the surviving spouse as to all decisions. In fact, the client would likely be dissatisfied with advice from a lawyer that she will need separate attorneys for the two categories of decisions. Because it is common for attorneys to represent such a client in both roles, and the Commentaries should not disapprove of a common practice that in fact serves the client well, the Fifth Edition shifted to an approach that would allow such representation except where there is an actual conflict.

There are numerous cases and ethics opinions that support this approach, although the rulings are very fact-dependent. In *Kennedy v. Kennedy*,[77] the court held that the client's positions as plaintiff suing his brother and as executor of his mother's estate were not in conflict, so the lawyer could represent the client in both capacities.

In a New York attorney disqualification case, *Flasterstein's Estate*,[78] the court held that an attorney may represent an executor who is also a residuary beneficiary of the estate, and thus the attorney should not be disqualified from doing so. In that case, the executor was attempting to acquire assets for the estate, which would have increased the shares of all of the residuary beneficiaries, and thus a conflict was not created by the two roles.[79] In dicta, the court commented that "it may be claimed" that an attorney represents conflicting interests if the attorney were to represent an executor who is also individually making a claim against

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[77] Nos. HHDCV084038504S, HHDCV094042030S, HHDCV106016706S, HHDCV115035876S, HHDCV116022030S, HHDCV116026647S, 2013 WL 3119216 (Super. Ct. Conn. May 28, 2013).

[78] *In re* Flasterstein's Estate, 210 N.Y.S.2d 307 (Sur. Ct. 1960).

[79] *Id* at 308.

the estate, but the opinion did not indicate what the court's ruling would have been under those facts.[80]

Subsequently in New York, the Surrogate's Court decided *Birnbaum's Estate*,[81] which relied on *Flasterstein* to conclude that an attorney representing a widow who was both a co-executor and a beneficiary of the estate, would not be disqualified from representing the widow.[82] In that case, the co-executor had made a loan from the estate to her son. A different co-executor brought suit to seek repayment of the loan. In addition, that other co-executor sought disqualification of the widow's attorney, based on an alleged conflict of interest due to the two roles played by the widow. The court ruled against disqualification, stating that the pending dispute involved the widow in her fiduciary capacity, not in her individual capacity as beneficiary.[83] The court also noted that three separate law firms were representing the three separate co-executors, that all of the children beneficiaries also had separate counsel, and that hiring separate counsel for the widow individually would be "unnecessary and wasteful."[84]

Also in New York, in *Estate of Tenenbaum*,[85] an attorney represented a client who was serving as both claimant and co-executor. When an opposing party moved to disqualify the attorney due to an alleged conflict of interest, the court declined to disqualify the attorney. The court noted that the client was pursuing her claim in her individual capacity as a claimant, and not as a co-executor.[86] In addition, the three co-executors were opposing the claim, and all three were represented by counsel. Thus the interests of the estate were adequately protected.[87] The court did note that if the claimant were the sole executor, then a conflict of interest "might conceivably" be present.[88]

In *Estate of Klarner,*[89] a Colorado case, the decedent left funds in a QTIP trust, with the remainder at the spouse's death to go to his two children and her two children. After he died, the widow changed her estate plan so that her estate would go to her two children alone. She had her two sons and a law firm appointed as trustees of the QTIP trust. On her death, there was a dispute whether the QTIP trust had to pay

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80 *Id.*

81 *In re* Birnbaum, 460 N.Y.S.2d 706 (Sur. Ct. 1983).

82 *Id.* at 707.

83 *Id.* at 708.

84 *Id.* at 709.

85 2006 N.Y. Misc. Lexis 9013 (Sur. Ct. Jan. 4, 2006).

86 *Id.* at *3-4.

87 *Id.* at *4.

88 *Id.* at *4-5.

89 *In re* Estate of Klarner, 98 P.3d 892 (Colo. App. 2003), *rev'd*, 113 P.3d 150 (Colo. 2005).

the estate taxes due as a result of its inclusion in the widow's estate. One of the arguments made by the decedent's two children was that the widow's sons and the law firm had a conflict of interest. The court of appeals held that the widow's sons had a conflict of interest in serving as trustees of the QTIP trust, and the law firm also had a conflict because it was in the "precarious position of advocating . . . an advantageous position for its clients, Marian's sons, that, if successful, would operate to the detriment of the beneficiaries to whom it owes a duty of loyalty."[90] The court of appeals directed the trial court on remand to determine whether the trustees should be removed and whether their compensation should be reduced or denied.[91] The decision was reversed by the Colorado supreme court, which held that the "friction" caused by the apportionment of taxes issue was insufficient grounds for removal of the trustees.[92] While this case involved a conflict because of the lawyers' role as trustee, where they owed clear duties to the trust beneficiaries, rather than mere representation of trustees, it illustrates the conflict that can arise.

So where is the line that triggers the need for separate representation of the client? The ACTEC Commentaries leave that up to the lawyer, with two examples that illustrate the safe zone without exploring the grey zone. An opinion analyzing the position of an attorney in an insurance defense tripartite relationship of lawyer/insurance company/insured gives a helpful description of how a conflict can arise when a lawyer is juggling a client's multiple roles. In *American Mutual Liability Insurance Co. v. Superior Court*,[93] the law firm was engaged by an insurance company to represent its insured, a doctor being sued for malpractice in several cases. The doctor then sued the insurance company for bad faith in connection with one of the malpractice cases. The law firm withdrew from representing the insured, and the plaintiff in a separate malpractice case petitioned for the law firm's files. The insurance company objected to the disclosure of the files. The court discussed the nature of a representation in an insurance defense setting that has some relevance to the fiduciary/beneficiary client because of the two roles.

> In such a situation, the attorney has two clients whose primary, overlapping and common interest is the speedy and successful resolution of the claim and litigation. Conceptually, each member of the trio — attorney, client-insured, and client-insurer — has corresponding rights and obligations founded largely on contract and, as to the attorney, by the Rules of Professional Conduct as well. The three parties may be

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90 *Id.* at 894, 895.
91 *Id.* at 899.
92 *See In re* Estate of Klarner, 113 P.3d 150 (Colo. 2005).
93 113 Cal. Rptr. 561, 565 (Cal. Ct. App. 1974).

viewed as a loose partnership, coalition or alliance directed toward a common goal, sharing a common purpose which lasts during the pendency of the claim or litigation against the insured. Communications are routinely exchanged between them relating to the joint and common purpose — the successful defense and resolution of the claim. Insured, carrier, and attorney, together form an entity — the defense team — arising from the obligations to defend and to cooperate, imposed by contract and professional duty. This entity may be conceived as comprising a unitary whole with intramural relationships and reciprocal obligations and duties each to the other quite separate and apart from the extramural relations with third parties or with the world at large. Together, the team occupies one side of the litigating arena.

> The tranquility of this coalition is disturbed however, where, as here, disagreement arises between the members. Dissatisfaction flowering into litigation may disrupt the harmony of the arrangement. The attorney who formerly represented two clients in a special and unique relationship now must choose among alternative courses of action. He may totally withdraw from the entire relationship. He may continue to represent the insured as to third parties on pending matters, continuing at the same time to represent the insurer. Other avenues may be open to the attorney but the carefully structured relationship, and the communications between the participants which theretofore had been founded upon and exchanged in confidence, and which had been an integral part of the arrangement, thereafter are markedly different in cases where insured and insurer become antagonists. Where, as here, the insured in suing the insurer further alleges active participation, indeed collusion, in the conduct in question of attorney and insurer, the attorney must and has withdrawn from further representation of the insured in all pending matters involving the insured. The situation has changed. Partners have become adversaries. The closely-knit fabric of confidentiality is torn and shredded.[94]

Applying this analysis to the fiduciary/beneficiary client, as long as the client's role as fiduciary does not conflict with the client's interests as a beneficiary, there is no conflict. But if those interests conflict, the "harmony" of the arrangement has been disturbed. The issue in this case was confidentiality, and ultimately the court held that the files could not be disclosed because of the duty of confidentiality owed to the client insurance company (although the language of the opinion was some-

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94 *Id.* at 572.

what confusing as to the basis of the holding).[95] The court's analysis is helpful in showing that the lawyer continues to owe duties to both clients in the tripartite relationships, even after the relationship deteriorates.

In *In re Trust Created by Hill*,[96] the law firm had drafted the trusts in 1917 and had represented the trustee of the trusts since then. The trusts held Oregon timberland. The daughter of the trustor was the beneficiary of one of the trusts and brought an action against the trustee for breach of fiduciary duty. The law firm had previously represented the daughter with respect to her personal business matters, and the daughter moved to disqualify the law firm from representing the trustee in the action. The law firm had also advised the daughter that she could not remove and replace trustees (one of the contested issues). The law firm no longer represented the daughter. The court held that the law firm should not be disqualified.[97] The court noted that the law firm had represented the trust for over seventy years and the daughter was aware of this.[98] The court further found that there were no confidences shared by the daughter that she could expect to be withheld from the trust.[99] The court analyzed the circumstances of the representation of the daughter and held that the matters were not substantially related.[100] This is likely a common scenario where a law firm represents a family for decades and advises multiple generations. The law firm avoided disqualification in this case but this could have gone either way, particularly since the law firm had advised the daughter on her rights in the trust.

In *Estate of Gory*,[101] the widow was the personal representative of the estate. She hired one law firm to represent her as personal representative and separate counsel for personal claims against the estate. The other beneficiaries objected to her fee, and the law firm representing her as personal representative represented her at the fee hearing. The other beneficiaries moved to disqualify the law firm, arguing that the law firm owed a fiduciary duty to the beneficiaries to ensure that excessive compensation was not paid. The trial court agreed that the fiduciary duties owed to both the personal representative and the beneficiaries meant that the lawyers could not represent one against the other.[102] The appellate court reversed.[103] The court had "no quarrel with the view

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95 *Id.*
96 499 N.W.2d 475 (Minn. 1993).
97 *Id.* at 495.
98 *Id.* at 493.
99 *Id.*
100 *Id.* at 492.
101 *In re* Estate of Gory, 570 So. 2d 1381, 1382 (Fla. 2015).
102 *Id.* at 1382-83.
103 *Id.* at 1383.

that counsel for the personal representative of an estate owes fiduciary duties not only to the personal representative but also to the beneficiaries of the estate."[104] However, the court pointed out that in Florida, the client is the personal representative rather than the estate or the beneficiaries:

> It follows that counsel does not generate a conflict of interest in representing the personal representative in a matter simply because one or more of the beneficiaries takes a position adverse to that of the personal representative. A contrary position would raise havoc with the orderly administration of decedents' estates, not to mention the additional attorney's fees that would be generated.[105]

In a similar holding, the Illinois court held that an executor's lawyer's duty is to the estate rather than the beneficiaries. In *Tagliasacchi v. Morrone,*[106] the lawyers represented the executor (who was also a beneficiary) for less than a year. When the lawyers withdrew, another beneficiary sued them for breach of fiduciary duty. The court noted that in a controversy among beneficiaries, the lawyer's duty is owed to the estate.[107] The court also noted that at the time the lawyers began representing the executor, the executor and her sister had been in conflict over the estate for years.[108] The lawyers could therefore not be able to represent the executor if they were also charged with protecting the "diametrically opposed" interests of the sister.[109] The lawyers therefore owed no duty to the sister and her complaint had been properly dismissed.

E. Evaluation of the Different Approaches

There are reasonable justifications for each of the aforementioned approaches, and that fact establishes how difficult it is to resolve which approach is the most consistent with a lawyer's ethical duties under the Rules of Professional Conduct. This section considers those justifications but leaves it to the reader (and the courts and disciplinary authorities) to answer that question.[110]

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104 *Id.*

105 *Id*. Notably, Florida's lawyer-client privilege statute states that for purposes of the privilege, "only the person or entity acting as a fiduciary is considered a client of the lawyer." FLA. STAT. § 90.5021(2) (2019).

106 2017 IL 1–17–1178 (Ill. App. Ct. unpubl. Nov. 21, 2017).

107 *Id*. at ¶ 12 (citations omitted).

108 *Id.* at ¶ 13.

109 *Id.*

110 Mr. Jones is most familiar with the Oregon approach, *see supra* Part III.C, and finds that approach to be most protective of the client's interests; Professor Boxx, who

The conservative approach, requiring separate attorneys for each role the client plays, may be the most expensive but certainly is the most protective for the attorneys involved, because it eliminates any suggestion of conflict. Each attorney can give focused advice on what is best for the specific role the attorney has been asked to advise, while still tailoring the advice to consider the effect of any course of action on the client's other interests. The Rules of Professional Conduct acknowledge that a lawyer should give more than "purely technical advice" and that it is "proper for a lawyer to refer to relevant moral and ethical considerations in giving advice."[111] In *Bagley v. Bagley*,[112] the Utah court was considering whether an automobile accident victim's surviving spouse could bring an action as heir and personal representative against herself as driver. In holding that she could bring the suit, the court responded to arguments from the Utah Defense Lawyers Association that allowing the suit would create a concurrent conflict of interest, even with separate lawyers representing her, because it would strain the attorney's ability to communicate with the client, who is also the opposing party.[113] The Association also argued that the client's ability to communicate with the attorney would be limited because she would be reluctant to reveal information to one lawyer that could be used against her.[114] The court said these arguments were "not without merit" but fail because the issues were "manageable," noting that the client had a requirement to cooperate with her insurer and the court could mitigate the issues.[115]

This situation is similar to a shareholder derivative suit, where a disgruntled shareholder is suing the corporation to compel the corporation to make claims against members of the management who have allegedly misappropriated corporate assets. In those situations, the corporation and the management have different interests, and the corporation must retain counsel different than the counsel retained by

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was co-Reporter for the Fifth Edition of the Commentaries, favors the middle ground approach followed by the Fifth Edition, *see supra* Part III.D.

111 MODEL RULES OF PROF'L CONDUCT r. 2.1 cmt. 2, 3 (AM. BAR ASS'N 1983).

112 387 P.3d 1000, 1003 (Utah 2016).

113 *Id.* at 1011 n. 37 (citing UTAH RULES OF PROF'L CONDUCT r. 4.2(a)).

114 *Id.*

115 Another example of a lawyer's ability to represent only one role when necessary is the position of White House Counsel. The White House Counsel is not the President's personal lawyer; he or she provides legal advice to the Office of the Presidency. While the position has come under significant criticism, primarily because the lawyers are "yes men" to the President, *see* BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 19 (2010), President Bill Clinton's relationship with White House Counsel Bernard Nussbaum was an example of the need to draw lines between the personal interests of the President and the role of the Presidency. *See* William H. Simon, *The Professional Responsibilities of the Public Official's Lawyer: A Case Study from the Clinton Era,* 77 N.D. L. REV. 999, 1009 (2002).

management. However, a corporation is an entity that can retain counsel to protect its interests. An estate cannot retain counsel in most states; only the personal representative retains counsel. Because of this legal disability, the two roles cannot be separated into two separate clients, but may be represented by separate lawyers.

In jurisdictions where the estate, rather than the fiduciary, is considered the client, the conservative approach seems to be the only ethical choice, since representing a beneficiary and the estate would present a significant conflict. Also, in jurisdictions where the fiduciary's lawyer owes some duties to the beneficiaries, the conservative approach may be necessary to keep the lawyer from impermissible conflicts.

The conservative view protects the lawyer in a claim that the lawyer failed to protect the executor's individual interests. In *Sabin v. Ackerman*,[116] for example, the lawyer represented the daughter of the decedent as executor of her father's estate. Her brother leased the father's farm and exercised an option to purchase the farm for less than fair market value. The lawyer prepared the documents to complete the sale. After the estate closed, the executor and her other brother sued the farming brother, challenging the option, and settled for a small amount. She then sued the lawyer for failing to advise her or to recommend independent counsel because of her potential claim as a beneficiary to challenge the terms of the option. The court ultimately dismissed the claim, finding that the relationship between an attorney and an executor does not impose a duty to protect the executor's personal interests.[117] The court also held that the facts did not indicate the executor thought the lawyer was representing her individually nor did they indicate a reason the option was open to challenge.[118]

The one-client-one-lawyer approach followed in Oregon, however, has logical appeal. Arguably, one attorney representing one client cannot present a conflict of interest. Consider the alternative: Let's assume an executor is also a claimant. One attorney can advise that one client whether it would be a breach of her fiduciary duties to pursue a claim against the estate. If the claim is valid and is supported by adequate evidence, then the executor cannot be held to have breached her fiduciary duties by pursuing that valid claim. But if the claim is uncertain or is not supported by adequate evidence, the pursuit of that claim might invite the beneficiaries to allege that the executor has breached her fiduciary duties by pursuing that questionable claim. The executor does not need two attorneys to so advise her. One attorney can (and should) eas-

116 846 N.W.2d 835, 837 (Iowa 2014).

117 *Id.* at 843.

118 *Id.* at 845.

ily recommend a course of action regarding that claim that will avoid potential liability on the part of the executor.

This is consistent with the notion that the job of the fiduciary's attorney is to help the fiduciary stay out of trouble, i.e., help prevent the fiduciary from breaching any fiduciary duties. In particular, one responsibility of the attorney is to minimize the liability of the fiduciary to the beneficiaries and the creditors. Any duties owed by the fiduciary's lawyer to the beneficiaries and creditors must be limited, or there will be conflicts with the duties of the lawyer owed to the fiduciary.[119] If the fiduciary's attorney does her job correctly, the beneficiaries will indirectly benefit because the attorney will advise the fiduciary to do her job properly by taking actions to protect the interests of the beneficiaries.

If an attorney cannot represent a fiduciary who is also a claimant, the client will need two independent attorneys: one to represent her as a fiduciary, and one to represent her as a claimant. What happens if the attorney for the creditor recommends that she pursue her claim, while the attorney for fiduciary recommends that the fiduciary resist that claim? That seems to be an untenable situation.

The two solutions at the far ends of the spectrum both can be justified but both have their flaws. The conservative approach is expensive and can be confusing to the client, particularly a client not experienced in dealing with lawyers. The client can be put in a position of getting conflicting advice without any counsel on how to reconcile such advice. The conservative approach therefore protects the lawyer from any ethical violations but does not necessarily serve the client. The one-client-one-lawyer approach is most appealing to the client, because the client can discuss all angles of the client's situation with one trusted advisor who is able to tailor his advice to serve both roles. However, the conflict between the two roles may make it impossible for the lawyer to give competent advice. The surviving spouse suing herself is one example where one lawyer could not advise both roles. In the trusts and estates context, one example of extreme conflict is the personal representative who is claiming personal ownership of a significant asset that can also be claimed by the estate. Another example is interpretation of distribution provisions in a trust where the surviving spouse is trustee and lifetime

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119 The Commentaries describe the duties to the beneficiaries and creditors as follows: "The lawyer for the fiduciary owes some duties to the beneficiaries of the fiduciary estate although he or she does not represent them. The duties, which are largely restrictive in nature, prohibit the lawyer from taking advantage of his or her position to the disadvantage of the fiduciary estate or the beneficiaries. In addition, in some circumstances the lawyer may be obligated to take affirmative action to protect the interests of the beneficiaries." *ACTEC Commentaries*, *supra* note 1, at 39.

beneficiary and the remaindermen are children from a prior marriage who are hostile to the stepparent.

The compromise position is appealing to lawyers because it suits lawyers' tendency to give "it depends" as an answer to everything. It attempts to achieve the best of both worlds, allowing the client one advisor (and one bill) except where the conflict would cause disciplinary or other problems for the lawyer. However, its drawback is the uncertainty. The lawyer must make the determination, in every case, whether the circumstance warrants separate representation, while most likely getting pressure from the client to represent the client in both roles. Lawyers in a jurisdiction like Oregon have the comfort of the ethical opinions and can always insist on separate representation in extreme cases. Lawyers in jurisdictions following the conservative approach can rely on the restrictions imposed by the disciplinary authorities in their state. Nevertheless, the compromise approach is the one most likely to be used by a lawyer not aware of any controlling authority, because it follows the general contours of how lawyers must evaluate any potential conflict.

IV. Best Practices for the Attorney for the Fiduciary

In contrast to fiduciaries, attorneys must studiously avoid conflicts of interest. In reviewing the various rulings and decisions, unless an attorney is practicing in a jurisdiction like Oregon or North Carolina that has drawn clear lines on the issue, the attorney is left with only vague guidance. The critical first step is to determine the positions taken by courts and the bar association in your own jurisdiction, and then to familiarize yourself with the common circumstances that have caused attorneys to be disciplined, sued for malpractice, or disqualified. If an attorney determines that dual representation is acceptable under the circumstances, additional precautions nevertheless should be taken.

The first best practice is to avoid representing a fiduciary while simultaneously representing one or more beneficiaries. As noted above,[120] the Commentaries and other authorities recognize some circumstances where this would be acceptable, but the lawyer must be clear that no conflict exists. Whenever communicating with beneficiaries, the fiduciary's attorney must avoid giving a beneficiary the impression that the attorney also represents the beneficiaries. The commentary to RPC 1.2 in the Commentaries recommends,

> As a general rule, the lawyer for the fiduciary should inform the beneficiaries that the lawyer has been retained by the fiduciary regarding the fiduciary estate and that the fiduciary is the lawyer's client; that while the fiduciary and the lawyer will,

120 *See supra* notes 29-33 and accompanying text.

> from time to time, provide information to the beneficiaries regarding the fiduciary estate, the lawyer does not represent them; and that the beneficiaries may wish to retain independent counsel to represent their interests.[121]

It would also be helpful to frequently remind the beneficiaries that the fiduciary's attorney represents only the fiduciary, and not any of the beneficiaries.

If the client is both fiduciary and beneficiary, the lawyer should clarify at the outset of the representation whether the scope of the representation will include both roles. The ACTEC sample engagement letter for fiduciaries contains the following language:

> Please understand that we represent you only in your fiduciary capacity as [PERSONAL REPRESENTATIVE/EXECUTOR]. We do not represent individual beneficiaries of the estate, even though we will from time to time provide them with information about your administration of the estate. In appropriate circumstances, we may advise beneficiaries to obtain independent counsel, as we do not represent them.
>
> [OPTIONAL PROVISIONS where the executor is also a beneficiary:]
>
> Because you are a beneficiary of the estate, we cannot advocate for you to maximize your share. If there is a dispute with another beneficiary about your entitlements, we cannot represent you individually in that dispute, and you will have to seek your own independent counsel.[122]

In addition to clarifying the scope of representation in the engagement letter, the lawyer should discuss the issue directly with the client so that there is no misunderstanding.

If the lawyer determines that under the circumstances, it is acceptable to advise the client with respect to both her fiduciary duties and her individual interests in the estate, it may be necessary or advisable to keep two sets of time entries, one reflecting time spent representing the fiduciary and one reflecting time spent representing the same person as beneficiary. The purpose of the two sets of time entries would be to charge the fiduciary estate for its representation, and to charge the same person individually for services related to the person's individual interests in the estate. In most situations where the client is both fiduciary and beneficiary, two sets of time records will not be necessary as long as

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121 *ACTEC Commentaries*, *supra* note 1, at 37.

122 *ACTEC Engagement Letters*, *supra* note 3, at 72.

the client's individual interests are not in conflict with other beneficiaries and the lawyer's advice is focused on the fiduciary estate administration. If the client's personal interests coincide with the clear wording of the trust document, then the fiduciary is not advancing the personal interests of the fiduciary as beneficiary, but instead is merely carrying out the terms of the fiduciary estate, which the fiduciary is obligated to do.

The ACTEC Commentaries suggest that if an attorney determines that it is acceptable to represent a person in both fiduciary and beneficiary capacities, the attorney should "insist" that the client sign a waiver releasing the attorney from any obligation to argue for the fiduciary's personal interest that may be "inconsistent with the client's fiduciary duty."[123] If the client declines to sign the waiver, the Commentaries suggest that the attorney should refuse to accept the dual capacity representation, and if such a conflict arises without a waiver in place the lawyer must withdraw from representation of the client in any capacity.[124] Under the Oregon approach, that seems to be too conservative, and would appear to lead to the need for the client to retain two different attorneys. Under the Oregon approach, one attorney can help the client balance her two interests and select a course of action that protects the interests of all parties. For example, in a sensitive situation the beneficiaries can be notified of the proposed course of action and be given an opportunity to object. If an objection is received, or one is anticipated, a petition can be filed with the court asking for instructions to be granted after a hearing at which the fiduciary and the objecting parties can all be heard.

The ACTEC Commentaries also discuss the question of obtaining waivers from the other beneficiaries in which they consent to the dual representation and waive the potential conflict. The Commentaries conclude that such waivers are not necessary, because the beneficiaries are neither present nor past clients of the attorney. As a result, the Commentaries conclude that such waivers "do not seem called for by the rules, nor do they seem necessary or appropriate."[125] But in Example 1.7-4, the Commentaries suggest that the beneficiaries should be advised that the attorney represents the fiduciary in both capacities and the beneficiaries should be advised that they may need to obtain independent counsel. Advising the other beneficiaries of the lawyer's role is consistent with the lawyer's duties under RPC 4.3[126] and should prevent misunderstanding. In any estate or trust administration, even one without a

123 *ACTEC Commentaries*, *supra* note 1, 107.
124 *Id.*
125 *Id.*
126 *Id.* at 192.

dual role held by the fiduciary, the attorney for the fiduciary should advise the beneficiaries that the attorney represents only the fiduciary, and not any of the beneficiaries, and the beneficiaries should be advised to obtain their own counsel if they have legal questions.[127] The presence of a fiduciary with two roles does not change that best practice. The notice to the beneficiaries should always inform them whom the attorney represents, and if the fiduciary has two roles, those two roles should be disclosed. However, the lawyer must remain vigilant to changes in circumstances that create an untenable conflict, considering the jurisdiction's view of the role of counsel for the fiduciary.

V. Conclusion

As with most ethical issues, there is no clear answer to whether an attorney may advise a client as to both the client's fiduciary duties and the client's individual interests as beneficiary of or creditor to the fiduciary estate. A strong argument can be made for allowing the practice, because then the attorney is in a position to assist the client in weighing the available options to serve both roles. Also, the attorney can be under pressure from the client to take on the dual representation as more efficient and economical. The potential for conflict, however, requires careful consideration of the specific circumstances before determining to take on such dual representation. The attorney should clarify the attorney's role at the beginning of the representation, to both the fiduciary and the beneficiaries, and all parties should be reminded of the attorney's role throughout the representation. The attorney must remain alert to the potential for conflict that limits the attorney's ability to give competent advice with respect to either role. As pointed out in the examples described in this article, failure to be alert to those conflicts can lead to a need to withdraw, or disqualification, discipline, or liability to a client.

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127 *Id.*

Estate Planning and Trust Management for a Brave New World: It's All in the Family. . . What's a Family?

*R. Hugh Magill**

O, wonder!
How many goodly creatures are there here!
How beauteous mankind is! O brave new world,
That has such people in't![1]

I. Introduction

The first phrase of the title of my presentation is intended to invoke two works of literature: Shakespeare's *The Tempest,* set upon Prospero's magical island, where it's difficult to distinguish the supernatural from the natural, illusion from reality.[2] Prospero's daughter, Miranda, is filled with wonder when she sees human beings for the first time as they embark upon the island after a shipwreck. She describes them as "goodly creatures" of this "brave new world."[3] Her wonder in encountering them is quickly put to nothing by her father, Prospero, who dismisses her by saying, "Tis new to thee."[4]

The second work, Aldous Huxley's existentialist novel *Brave New World,* published in 1932, is set in London in approximately 2540 AD.[5] Citizens are born in artificial wombs where they are predestined into one of five castes or classes.[6] The world encountered by Miranda and the one envisioned by Aldous Huxley seem to me to be drawing a little closer.

This is sufficient existentialist musing . . . let us consider a real family, one to whom I was introduced six or eight years ago by the Chairman of my company. The husband, a Traditionalist, was a retired CEO of several major American corporations. He was divorced and remarried. His second wife, a Boomer, was a successful professional. They

* Vice Chairman, The, Northern Trust Company, Chicago, Illinois.
1 William Shakespeare, The Tempest, act V, sc. I.
2 *Id.*
3 *Id.*
4 *Id.*
5 Aldous Huxley, Brave New World (1932).
6 *Id.*

look like a fairly typical, blended American family: three children of the first marriage, Gen Xers; two children of the second, Millennials. On the family tree, they look like a two-generation family.

Demographically, however, this was a four-generation family, owing to the differences in the eras in which the members were born and raised. This family structure presents some challenges in estate planning and the allocation of financial wealth, which I will explore a little bit later. This mixture of four generations, a Traditionalist, a Boomer, Gen Xers and Millennials, in one family is one of several encounters that led to the research that forms the foundation for this lecture.

II. Generational Attributes

Let us turn and consider the attributes of the generations whom we serve as clients today, from the Greatest Generation, which largely shaped our traditional paradigm of estate planning, to Millennials who are reshaping expectations and norms in a number of areas. The generational attributes and characteristics that I will share this morning are drawn from many sources — the Pew Research Center,[7] Paul Taylor's work *The Next America*,[8] research data from the Census Bureau[9] and the National Institutes of Health.[10] These observations are, of course, broad generalizations, and I hope that none will take umbrage if some seem far off the mark or others strike a little too close to home — they are never fully accurate.

We will consider five generations of Americans, from the GI and the Silent Generations (sometimes grouped together and called Traditionalists) down to Millennials. Alexis de Tocqueville observed in his seminal work, *Democracy in America*, that each generation is a new people.[11]

Whether or not there is such a thing as a generational persona is an issue debated by sociologists, but in the view of some scholars, there are four archetypal generational personas, and one of these will be attached to each of the four generations.[12]

Let us turn and look at the first generation, the Traditionalists, the grouping of the Greatest and the Silent Generation, whose lives were

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7 Pew Research Ctr., https://www.pewresearch.org/ (last visited June 18, 2019).

8 Paul Taylor & The Pew Research Center, The Next America: Boomers, Millennials, and the Looming Generational Showdown (PublicAffairs 2016).

9 U.S. Census Bureau, https://www.census.gov/ (last visited June 18, 2019).

10 Nat'l Institutes of Health, https://www.nih.gov/ (last visited June 18, 2019).

11 Alexis de Tocqueville, Democracy in America, Volume 2, 47 (Henry Reeves trans., 2006) (ebook).

12 Neil Howe & William Strauss, Millennials Rising: The Next Great Generation (Vintage 2000).

grounded in and shaped by the depression and World War II. I will pose seminal questions for each of these generations. For Traditionalists, I ask, "Where were you on D-Day?" "How did you learn about D-Day?" You likely learned about it gathered in your living room around a wooden family radio.

A third of these Americans lived on farms, many in multigenerational households.[13] Spousal and parent-child relationships were narrowly defined. Tom Brokaw, the author of *The Greatest Generation*, said of this group, they were people of "towering achievement but modest demeanor."[14] Their character traits include duty — to nation, to Church, to job. Institutional commitment was very high — to marriage and to employers, and respect for institutional authority was also very strong. Their leadership and decision-making style tended toward paternalism and control, which has shaped this generation's approach to estate planning.

I turn next to my own generation, the Boomer Generation. We are sometimes known as the Woodstock Generation; Woodstock was our "coming out party." Our retirement party will be occurring steadily over the next dozen years: Boomers have been entering retirement for the last few years at the rate of 10,000 individuals per day; an average of 10,000 boomers will turn 65 every single day until 2030.[15] The aging of this generation will have a profound effect on our population demographics. The United States Census Bureau data indicate that in 2010, 13% of our population was over the age of 65.[16] By 2030 that percentage will rise to over 20%.[17]

This generation was shaped by 1960s turbulence, by the Vietnam War, and by tragic political events, including a presidential assassination, which contributed to their sense of identity. They learned about these events not on a radio but on a television, often with a grainy black-and-white picture. The parental model for this generation was evolving. The burgeoning institutionalization of food preparation, through both canned and frozen food, allowed women modest increases in time and autonomy. Children still knew that adults were in charge but strict obedience begins to give way to accommodation, particularly by the 1960s. Some political commentators and social commentators attribute today's highly polarized political environment to our upbringing: we choose

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13 TOM BROKAW, THE GREATEST GENERATION 4 (Random House 1998).

14 *Id.* at 11.

15 *See* TAYLOR ET AL., *supra* note 8, at 15.

16 JENNIFER M. ORTMAN ET AL., AN AGING NATION: THE OLDER POPULATION IN THE UNITED STATES, at 2-3 (2014), https://www.census.gov/prod/2014pubs/p25-1140.pdf.

17 *See id.*

sides. When we grew up, there were communists and capitalists; there were good guys and bad guys; there were winners and losers.

Institutional authority enjoyed a brief period of prominence but was utterly, and sometimes violently, rejected in the turbulence of the 1960s, and then reembraced as Boomers came to understand that institutions in a capitalistic society offered you the opportunity to make money.

Let us consider Generation X. Gen X was the first generation to grow up increasingly in two-career households. Sadly, dramatic increases in parental divorce rates are one of their defining characteristics. It's the first generation where digital technology begins to gain a foothold in the household. This kind of technological change led to the phenomenon that adults began to learn from their children. Gen Xers were also the first generation of latchkey kids, owing to the fact that many of their households were dual-income households. Latchkey kids came home, let themselves in the house, went to the fridge, got a carton of milk, then got a cookie, and sat down. And when they looked at the milk carton, what did they see? They saw a picture of a missing child.

The character traits of this generation include skepticism and suspicion of organizations, government, and authority. Their decisions rest upon a kind of functional and necessary independence and pragmatism. And having watched their parents' work-life imbalance, the role of work in relationship to life is very important for this generation.

Let us turn now to the Millennial Generation. I need to begin with an admission: I am the father of three; I am a colleague of many more; so I may have a bit of a selection bias. The Millennials are a remarkable generation, shaped by extraordinary forces. They witnessed 9/11; they helped to elect President Obama; they are the first generation of so-called digital natives; and they are the first generation to grow up in a much broader array of household structures.

While both of their parents typically worked, greater flexibility in work arrangements meant that Millennials were less likely to be latchkey kids. They have been raised by parents who are described as having "biological instincts in overdrive" leading to the moniker "helicopter parents." College deans now say that the hardest part of freshman orientation is not getting the students to stay, it's getting the parents to leave.

The character traits of Millennials include high self-esteem. We have heard the phrase that "every one of them gets a trophy," but I think it's important to point the trophy finger back at us, because it was Boomers who were giving them the trophies. They have an albatross of student loan debt, and they have higher levels of unemployment since the economic turbulence of 2008. Our retired chief economist Paul Kas-

riel once was asked, "Paul, how do you define full employment?" Paul paused and said, "That's when both of my kids have a full-time job."

Millennials are also described as a post-racial, post-gender generation.

So how long are these generations likely to live? Life expectancy in the United States has been increasing dramatically since 1900.[18] Early reductions in infant mortality, accompanied by the introduction of antibiotics in the 1930s and the 1940s, followed by improved diets and lower levels of smoking, have led to the fact that in 2016, an American female could expect to live to the age of 81, and an American male to age 76.1.[19] And in a fascinating comparison over the last 118 years, a 20–year-old today is more likely to have a living *grandmother* than a 20-year-old was to have a living *mother* in 1900.[20]

III. Family Demographics

Let us turn and begin to look at some of the demographic changes resulting from these generational attributes. The first is a dramatic change in the composition of U.S. households. Married couples constituted nearly 80% of households in the 1950s, but that group has recently dipped below 50%.[21] The fastest growing segment in our population is unmarried, heterosexual couples, either without children or with children.[22] Today, 18% of adults between the ages of 18 and 29 are married;[23] in 1960 59% of 18 to 29 year olds were married.[24] It is not just Millennials who are eschewing marriage: the number of cohabiting adults who are age 50 and older has increased 75% in the last 10 years.[25] Men's and women's marital status reflect a decreasing preference for marriage. If and when men and women do marry, both men and women

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18 *See* Elizabeth Arias & Jiaquan Xu, *United States Life Tables, 2015*, Nat'l Vital Statistics Reports, Nat'l Ctr. For Health Statistics, at 45-47 (2018), https://www.cdc.gov/nchs/data/nvsr/nvsr67/nvsr67_07-508.pdf.

19 U.S. Dep't Health & Human Servs., *Health, United States, 2017: With Special Feature on Mortality*, Nat'l Ctr. for Health Statistics, at 4 (2018), https://www.cdc.gov/nchs/data/hus/hus17.pdf.

20 Taylor et al., *supra* note 8, at 57.

21 *Historical Household Tables, Table HH-1. Households by Type: 1940 to Present*, U.S. Census Bureau (2018), https://www.census.gov/data/tables/time-series/demo/families/households.html (last visited June 18, 2019).

22 *See* Daphne Lofquist et al., *Households and Families: 2010*, U.S. Census Bureau, at 5, tbl. 2 (Apr. 2012), http://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf.

23 Taylor et al., *supra* note 8, at 113.

24 *Id.*

25 Anthony Cilluffo & D'Vera Cohn, *Ten Demographic Trends Shaping the U.S. and the World in 2017,* Pew Research Ctr. (Apr. 27, 2017), https://www.pewresearch.org/fact-tank/2017/04/27/10-demographic-trends-shaping-the-u-s-and-the-world-in-2017/ (last visited June 18, 2019).

are usually older.[26] There is a correlation between educational level and marriage postponement,[27] but age at first marriage trends have been rising steadily over the last 30 or 40 years.[28]

Young adults today are more likely to marry someone of a different race and ethnicity,[29] a trend which tends to skew westward in the United States, to the western states, and particularly Hawaii, which has the highest rates of intermarriage.[30]

Summarizing all of this, sociologists would suggest that the paradigm of marriage is changing in fundamental ways. It's increasingly deferred or even bypassed by heterosexual couples, but embraced by same-sex couples, following recent United States Supreme Court decisions. For Traditionalists and Boomers, marriage was seen as a *cornerstone* experience: i.e., after dating, couples married. They then lived together, they had children, and finally they may have achieved some level of financial stability. But for Gen Xers and Millennials, marriage is increasingly seen as a *capstone* experience. They date, they are likely to live together, they may attain some financial security, they have children, and then marriage might follow as a capstone experience. A troubling footnote to these trends is that a teenager in the United States today has a smaller chance of being raised by both biological parents than in any other country in the world.[31]

These trends notwithstanding, the United States Supreme Court has continued to recognize marriage as both a basic civil right and an institution central to our human existence.[32] There is a growing group of sociologists and law professors, however, who regard marriage as a declining and indeed, an unimportant institution.[33] Even the American public is moving towards this view. In a 2010 Pew Research survey, 39%

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26 *Historical Marital Status Tables, Table MS-2. Estimated Median Age at First Marriage, by Sex: 1890 to the Present*, U.S. CENSUS BUREAU (2018), https://www.census.gov/data/tables/time-series/demo/families/marital.html (last visited June 18, 2019).

27 Kim Parker & Renee Stepler, *As U.S. Marriage Rate Hovers at 50%, Education Gap in Marital Status Widens,* PEW RESEARCH CTR. (Sept. 14, 2017), https://www.pewresearch.org/fact-tank/2017/09/14/as-u-s-marriage-rate-hovers-at-50-education-gap-in-marital-status-widens/ (last visited June 18, 2019).

28 *See Historical Marital Status Tables, Table MS-2*, *supra* note 26.

29 Miriam Jordan, *More Marriages Cross Race, Ethnicity Lines*, WALL ST. J., Feb. 17, 2012, https://www.wsj.com/articles/SB10001424052970204880404577226981780914906.

30 TAYLOR ET AL., *supra* note 8, at 128.

31 Kay Hymowitz et al., *Knot Yet: The Benefits and Costs of Delayed Marriage in America*, NAT'L MARRIAGE PROJECT U. VA. (2013), http://nationalmarriageproject.org/wp-content/uploads/2013/03/KnotYet-FinalForWeb.pdf.

32 *See* Loving v. Virginia, 388 U.S. 1, 12 (1967); *see also* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

33 NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW (2009).

of Americans and 44% of Millennials said that marriage is becoming obsolete.[34]

This perspective has gained ground notwithstanding the extraordinary deference to and benefits of marriage legally. The United States Supreme Court cited fourteen benefits of marriage in its 2015 decision, *Obergefell v. Hodges*.[35] In 2004 a United States Government Accountability Office research study found that there were 1138 provisions of Federal Law that treated the relationship between two people who are married differently from any other relationship.[36]

IV. Changes in Family Structures

How are these generational attributes and relationship trends affecting family structures? Here is a snapshot of what a prototypical American family looked like (statistically) in the 1950s: A married, heterosexual couple with three biological children. In this case, however, it's actually not a 1950s family, it's a contemporary family whose photo appeared in a recent issue of *Costco Connection* magazine.[37] The husband and wife met at Costco, acquired many of the accouterments for their wedding at Costco, and celebrated their first anniversary at Costco. I must admit that I am a card-carrying Costco member. I didn't know though, in the era of internet dating apps, that couples were still meeting at the warehouse club. Most importantly, the wife is quoted in the magazine saying that she found her "Kirkland Signature brand husband at Costco."[38]

Notwithstanding Costco's delight with such committed customers, a married couple with three children, the 1950's most common, is actually now 7th on the list of American households.[39] The Census Bureau promulgated a fascinating study in 2016 based on the American Community survey.[40] This study identified 10,276 different household types in the United States. The most common household is a single individual; second, a married couple; third, a married couple with one child; and fourth, a married couple with two children.[41] Somewhere buried in the

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34 *See* Taylor et al., *supra* note 8, at 144.

35 *Obergefell*, 135 S. Ct. at 2623.

36 Letter from Dayna K. Shah to Bill Frist (Jan. 23, 2004), U.S. Gen. Accounting Office, GAO-04-353R, Defense of Marriage Act, https://www.gao.gov/assets/100/92441.pdf.

37 Erica Evans & Jeremy Evans, *Love in Bulk*, Costco Connection, Feb. 2018 at 110.

38 *Id.*

39 Nathan Yau, *Most Common Family Types in America*, FlowingData, https://flowingdata.com/2016/07/20/modern-family-structure/ (last visited June 18, 2019).

40 *Id.*

41 *Id.*

data is a retired colleague of mine, Don Oomens, who was a Federal Estate Tax Return Reviewer with my Company. Don and his wife had 17 biological children. I think their family may be number 10,275.

Let us begin to consider how family structures are evolving. The Greatest Generation had traditional family structures. They usually had three children,[42] and if divorce occurred in traditional families, it was usually after the children were raised.[43] If there was a so-called *second act*, it was often by the husband. This phenomenon was one of the rationales behind the introduction of Qualified Terminable Interest Property and the QTIP Trust in 1981.[44] Mortality statistics indicated their husbands would generally predecease their wives, and husbands feared that their wives upon remarrying would divert family assets to the new spouse.[45] For the Traditionalist Generation, statistics didn't prove out the fear. For widowed women, 8% of them remarried, and it was generally eight years after the loss of their first spouse. For men, 20% remarried but they only waited four years to do so.[46]

For Boomers, earlier divorces have been more common. They hold more salutary views about the impact of divorce on children and there is less social stigma associated with divorce. A frequent result is remarriage and blended families. One-sixth of American children are growing up today in blended families,[47] and 40% of Americans have one or more step-relatives.[48]

The United States Supreme Court's recent decisions, *United States v. Windsor* (striking down DOMA)[49] and *Obergefell v. Hodges*[50] (guaranteeing the right to marry for same-sex couples) undergird the rapid growth of same sex marriages and the possibility of second parent adoption of children born to either spouse.

Another recent development is that of *three parent families*, where following a divorce, a second spouse can be granted parental rights in

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42 Sharon E. Kirmeyer & Brady E. Hamilton, *Childbearing Differences Among Three Generations of U.S. Women*, No. 68, NCHS DATA BRIEF, at 1 (Aug. 2011), https://www.cdc.gov/nchs/data/databriefs/db68.pdf.

43 *Breaking Down Divorce by Generation*, GOLDBERG JONES (Aug. 9, 2018), https://www.goldbergjones-wa.com/divorce/divorce-by-generation/ (last visited June 18, 2019).

44 I.R.C. § 2056 (b)(7).

45 Economic Recovery Tax Act of 1981, Pub L. No. 97-34, 95 Stat. 172 (1981).

46 Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21 (1994).

47 Cilluffo & Cohn, *Ten Demographic Trends Shaping the U.S. and the World in 2017, supra* note 25.

48 *A Portrait of Stepfamilies*, PEW RESEARCH CTR. SOC. & DEMOGRAPHIC TRENDS (Jan. 13, 2011), https://www.pewsocialtrends.org/2011/01/13/a-portrait-of-stepfamilies (last visited June 18, 2019).

49 United States v. Windsor, 570 U.S. 744, 745 (2013).

50 Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015).

some states, either as a de facto parent (which is recognized in California[51]) or through third parent adoption, where the former spouse, the biological parent, does not need to relinquish parental rights. This structure is recognized judicially, at least in Minnesota[52] and the Province of Ontario.[53] Three (or more) parent families are recognized as an alternative in Section 613 of the Revised Uniform Parentage Act.[54]

Trends in artificial reproductive technology also make elective single parenting possible. There is a support group founded in New York in 1981 by a woman named Jane Mattes called Single Mothers by Choice.[55] Some single parents, though, are choosing to enter into co-parenting arrangements. A website founded in 2012 called Modamily helps match people interested in co-parenting, and at last count, it had over 20,000 members.[56] One proponent, a child psychologist, George Sachs, says, "This co-parenting process removes many of the mysteries of how your child will be raised."[57] Another, Jane Mattes, the founder of the website Single Mothers by Choice says, "It's really difficult to co-parent when you are madly in love with somebody. So it's more complicated when you don't have that bond."[58]

Striking advances in artificial reproductive technology now permit banking of reproductive material, making even posthumous reproduction possible. Storage of gametes and embryos is sometimes undertaken as a precautionary measure at the onset of disease, or in anticipation of military service, or increasingly today in connection with family planning. Utilization of reproductive material after the death of a spouse leads to the possibility of posthumous reproduction. State laws are by no

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51 *See* CALIF. RULES OF CT. § 5.502(10) (2019).

52 La Chapelle v. Mitten, 607 N.W.2d 151, 168 (Minn. Ct. App. 2000).

53 A.A. v. B.B. (2007), 83 O.R. 3d 561 (Can. Ont. C.A.) (available at https://www.canlii.org/en/on/onca/doc/2007/2007onca2/2007onca2.html).

54 UNIF. PARENTAGE ACT § 613(c) (Alternative B) (UNIF. LAW COMM'N 2017). The Uniform Act offers two versions of subsection c of section 613 for states choosing to enact it. Alternative A restricts parentage to two individuals, but Alternative B permits more than two individuals to be deemed a child's parents if it is in the best interest of the child to do so. "Alternative B is consistent with an emerging trend permitting courts to recognize more than two people as a child's parents. . . . Alternative B, however, stakes out a narrow, limited approach to the issue by erecting a high substantive hurdle before the court can reach this conclusion: a court can determine that a child has more than two legal parents only when failure to do so would cause detriment to the child." *Id.* § 613 cmt.

55 Danielle Braff, *When is the Right Time to Start a Family on Your Own?*, CHI. TRIB., Mar. 26, 2016, https://www.chicagotribune.com/lifestyles/sc-start-single-family-0329-20160331-story.html.

56 MODAMILY, http://www.modamily.com/ (last visited June 18, 2019).

57 Braff, *supra* note 55.

58 *Id.*

means uniform regarding the inheritance rights of posthumous children.[59]

Several years ago as I was starting this research, I had a fascinating conversation with a friend. I was telling him about the research for this lecture, and he told me the following story. A friend of his who was a headmistress of a day school in the Northeast, every fall welcomed the incoming class, and met with each of the children individually to introduce herself and to welcome that child into the community. One of her common topics was "tell me a little bit about your family." With one little girl, I will call her Suzie, she asked, "Suzie, do you have any siblings?" And Suzie said, "No, but I have five diblings." She thought, "What is a dibling?" but, of course, she didn't say this to Suzie. So later in the day, she approached Suzie's teacher and said, "Suzie has five diblings. What's a dibling?"

Here's what a dibling is: a donor-sibling. They are the descendants of one male genetic donor, who are related to each other by blood, either half blood or whole blood. They get together for play dates, they share birthdays, they may vacation together. This trend was noted in a *New York Times* article from 2012, about the process of discovering whether or not you have donor siblings or diblings.[60]

These new family structures are enabled, in part, by extraordinary advances in artificial reproductive technology. There are presently 15 variables involved in artificial reproductive technology, including the possibility of using a hybrid egg produced by something called spindle nuclear transfer technique.[61] A child has been born in the United States who is genetically a descendent of three parents.[62]

Here are the most recent ART statistics in the United States. I have updated these statistics from Bruce Stone's excellent materials from Heckerling several years ago. In the United States, there are over 250,000 artificial reproductive cycles each year, leading to over 65,000 live births, and over 75,000 infants.[63] The difference in the birth and infant statistics is the result of higher numbers of twins and triplets with these methods. There are one million embryos estimated to be in stor-

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59 Note, e.g., UNIF. PROBATE CODE § 2-120(k) (UNIF. LAW COMM'N 2010).

60 Tamsin Eva, *Donor Siblings, and a New Kind of Family,* N.Y. TIMES MOTHERLODE (July 1, 2012, 7:00AM) https://parenting.blogs.nytimes.com/2012/07/01/donor-siblings-and-a-new-kind-of-family/.

61 Tina Hesman Saey, *First 'Three-Parent Baby' Born from Nuclear Transfer,* SCI. NEWS (Sept. 27, 2016, 6:14PM), https://www.sciencenews.org/blog/science-ticker/first-%E2%80%98three-parent-baby%E2%80%99-born-nuclear-transfer.

62 *Id.*

63 *Assisted Reproductive Technology (ART): ART Success Rates*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/art/artdata/index.html (citing figures for 2016 and 2017) (last visited June 18, 2019).

age in the United States,[64] and almost 2% of U.S. births in 2016 were the result of artificial reproductive technology.[65]

And, of course, where there is a new technology, there's going to be a new website and a new capitalist opportunity. There is a company in California called California Conceptions Donor Embryo Program which runs an embryo creation clinic. This company purchases genetic material from donors, from which they create embryos, and then offer these for sale to individuals for $12,500 for three implantations, including a money back guarantee.[66]

This diversity of American family structures leads Paul Taylor, the author of *The Next America* to observe that "families now come in all shapes, sizes and constellations."[67] Let us step back and see how they array themselves in the United States. Thirty-one percent of American households are without children; 35% are traditional, heterosexual, married couples with children; and 34% are modern households.[68]

How will our engagement with contemporary families evolve to ensure that their wealth management and their wealth transfer goals will be achieved? The implications of these changes have often overwhelmed me in the last two years. Much good work is already being done in your practices and in the committees of the College. I would like to offer a few observations and pose a number of questions about the implications of these changes in the sections that follow. How will these families allocate wealth? How will their trusts evolve? What are the implications of much longer lifespans? And last, how will these families collaborate and make decisions?

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64 Elissa Strauss, *The Leftover Embryo Crisis,* ELLE, Sept. 29, 2017, https://www.elle.com/culture/a12445676/the-leftover-embryo-crisis/.

65 Of the 3,941,109 babies born in 2016, 76,930 were born as a result of ART. *See* Nicholas Bakalar, *U.S. Fertility Rate Reaches a Record Low*, N.Y. TIMES, July 3, 2017, https://www.nytimes.com/2017/07/03/health/united-states-fertility-rate.html; *Assisted Reproductive Technology (ART) Data: National Data*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://nccd.cdc.gov/drh_art/rdPage.aspx?rdReport=DRH_ART.ClinicInfo&rdRequestForward=True&ClinicId=9999&ShowNational=1 (last visited June 18, 2019).

66 *See California Conceptions Donor Embryo Program*, CAL. IVF FERTILITY CTR., http://www.californiaconceptions.com (last visited June 18, 2019).

67 TAYLOR ET AL., *supra* note 8, at 156.

68 *See America's Families and Living Arrangements: 2017, Table F1. Family Households, By Type, Age Of Own Children, Age Of Family Members, And Age Of Householder: 2017*, U.S. CENSUS BUREAU (2017) (available through the link at https://www.census.gov/data/tables/2017/demo/families/cps-2017.html (last visited June 18, 2019)).

V. Wealth Allocation for Contemporary Families

Let us explore the first question by considering an even more basic one, the haves and the have-nots of estate planning: the testate and the intestate in the United States. There have been numerous studies in the United States, from Consumer Reports to academic studies, which generally find intestacy levels in the 50% to 70% range.[69] An academic study conducted in 2009 by Stanford law professor, Alyssa DiRusso, surveyed 324 respondents across 45 states, finding that 68% of them had no will, about 20% of them had a will drafted by counsel, 11% practiced self-help and 1% didn't even know.[70]

A more comprehensive review has been done in a longitudinal study at the University of Michigan.[71] Begun in 1990 under the auspices of the National Institute on Aging and the Social Security Administration, it is called the Health and Retirement Study ("HRS"). Every two years HRS surveys 20,000 Americans ages 50 and older on a wide range of issues relating to their health, their income, their living circumstances, and their production of and consumption of wealth in retirement.[72] Participants span a broad range of attributes socioeconomically, geographically and racially. One of the issues they survey is intestacy.

In general, HRS finds that 42% of their respondents have no will at the time they are surveyed,[73] and 38% will die without an estate plan in place.[74] These are lower levels of intestacy than generally found (likely due to the inverse correlation between age and intestacy) but there is a striking correlation between three attributes and substantially higher levels of intestacy. First, families with stepchildren: 49% of these respondents do not have a will.[75] Second, in families where there has been a breakdown in a relationship with an adult child — an emotional cutoff for at least a period of a year — 58% of these individuals do not have a will.[76] And last, sadly, among divorced respondents, almost two-thirds

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69 A 2016 Gallup poll found a general intestacy rate in the United States of 56%. *See* Jeffrey M. Jones, *Majority in U.S. Do Not Have a Will*, Gallup, May 18, 2016, https://news.gallup.com/poll/191651/majority-not.aspx.

70 Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 Quinnipiac Prob. L.J. 36, 41-42 (2009).

71 *See* U. Mich. Inst. for Soc. Res., The Health & Retirement Study, *Aging in the 21st Century: Challenges and Opportunities for Americans* (2017), http://hrsparticipants.isr.umich.edu/sitedocs/databook/inc/pdf/HRS-Aging-in-the-21St-Century.pdf [hereinafter *Aging in the 21st Century*].

72 *Id.* at 10.

73 Marco Francesconi et al., *Unequal Bequests* 3 (Nat'l Bureau of Econ. Research, Working Paper No. 21692, 2015), https://www.nber.org/papers/w21692.pdf.

74 *Id.* at 4.

75 *Id.* at 3.

76 *Id.* at 3-4.

do not have wills.[77] As we raise questions about the need for sophisticated estate planning in an era of very high transfer tax exemptions, I think there's an opportunity to build bridges with the matrimonial bar in addressing the estate planning needs of this latter group of clients. The other two are going to require some sensitivity and creativity. I will talk about that in a moment.

Why is it difficult for these individuals, those with step families, families with emotional cutoff, and divorced individuals to undertake estate planning? For divorced individuals, I suspect that many may be war-weary following the completion of a divorce. Another reason is more foundational: I think it is harder for these individuals to answer estate planning's fundamental questions. First, who will inherit?; second, how much?; third, when should family members receive their inheritance?; fourth, should it be left outright or in trust?; and fifth, who will step into our shoes? These are weighty questions for every client, but I believe they are more challenging for the individuals with higher intestacy levels . . . and for contemporary families.

Another issue arises in considering wealth allocation for contemporary families: will they leave their wealth equally among their descendants? Economists have been intrigued for years by the issue of wealth allocation, and they are puzzled by the fact that families tend to allocate wealth equally among children. They have developed a number of economic theories to rationalize their expectation that individuals would not generally leave wealth equally among collateral descendants.[78] The first is called the *altruist* model which suggests that parents want to leave wealth in a way that equals things out among children of different means.[79] The second, called the *exchange* model indicates that parents would leave wealth to compensate those who have cared for them — wealth in exchange for services.[80] And the third, the *evolutionary* model, implies that parents will leave wealth to children who are likely to beget grandchildren — funding for the production of heirs, so to speak.[81]

Some academic researchers, though, attribute equality in wealth allocation to a different phenomenon. They say that attorneys are fearful about unequal distributions, and discourage them because of the risk of litigation.[82]

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77 *Id.* at 10.

78 *See id.* at 5.

79 *Id.*

80 *Id.*

81 *Id.* at 6.

82 *Id.* at 7.

Fortunately, mother knows best. Ninety-two percent of American mothers, when surveyed, respond by saying that they intend to leave their wealth equally to their children.[83]

Questions about wealth allocation in the United States are possible, indeed, because of a central tenet of American law — *freedom of disposition*. Our clients are free to allocate their wealth in any way they wish, subject to limited public policy restraints. Immigrants to the United States may find this freedom a bit puzzling, even discomforting. Some come to appreciate this freedom. Others may hew back to the country of their origin, and its cultural, legal or religious dictates regarding the disposition of wealth. The increasing diversity of our population presents an opportunity to develop an understanding of different systems of wealth allocation, facilitating representation of a more diverse array of clients.

Let me return now to the family with which I began today's presentation. What I didn't discuss previously was the compression in age gaps between the members of this family. The father, the Traditionalist, is 15 years older than his Boomer spouse, and she is only about 15 years older than her stepchildren, the Gen Xers, and they are roughly 15 years older than their half siblings, the Millennials descended from the second marriage.

The wife is concerned in the planning process about the traditional approach of deferring the children's inheritance until she has died — the life estate/remainder construct. She fears that her stepchildren will see her as an impediment to their inheritance, and they will frequently be renting the movie, *Throw Momma from the Train* on Netflix. The plan that arose out of many discussions with this couple combined lifetime gifts — accelerating the children's inheritance — complemented by testamentary transfers to provide for the wife and the grandchildren, thus rejecting the traditional life estate/remainder approach to wealth transfer. A critical element of this plan was the conversation between the parents and children about the estate plan: the children were advised that their lifetime transfers would constitute their entire inheritance, so they did not have to await their stepmother's passing.

Let us consider the role of family dialogue in the estate planning process. The dispositions of wealth by the Greatest Generation were generally not accompanied by discussions about wealth and wealth transfer. These were things that families didn't talk about. Contemporary and Boomer families, though, need and want to discuss these issues, but they need help in the process. They do not have a model to follow,

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[83] Audrey Light & Kathleen McGarry, *Why Parents Play Favorites: Explanations for Unequal Bequests* 3 (Nat'l Bureau of Econ. Res., Working Paper No. 9745, 2003), https://www.nber.org/papers/w9745.pdf.

and they can benefit from our counsel about how to have these kinds of conversations.

The plan that we just considered for one wealthy, blended American family raises a host of issues that I think will have general utility in planning for contemporary issues: from wealth sufficiency to the advisability of working together to maintain a shared asset, such as this family's cottage. Issues this family faced and their advisors' approach suggest an evolution is underway in our approach to both estate planning and trust management. What is this new approach looking like?

Let us turn first to estate planning. In an era of dramatically increased transfer tax exemptions, our focus may be less centered on transfer taxes and more oriented to family goals (accomplished in a tax efficient matter). The planning process is becoming less paternalistic and colloquial, and evolving into one that is more engaging and adaptable to family composition; one that is less narrow culturally to one that is more cognizant of diverse cultural perspectives; and finally one that adds to its perspective on the balance sheet an enlarged understanding of each family's total wealth.

Fiduciaries are encountering a similar paradigm shift where a focus on unchangeable grantor intent may be moving toward expressions of intent that are more aspirational and flexible.

VI. Issues in the Design of Trusts for Contemporary Families

I would like to turn now to the design of trusts themselves. It's axiomatic to this group that trusts prescribe the ways in which financial wealth will be managed for beneficiaries by codifying grantor intent in a trust agreement, one which is interpreted within its own four corners. Within those corners, there has often been a divide between grantor intent and beneficiary expectations. The divide which trusts must navigate has always been large, but I would suggest that today it's even larger owing to the differences in generational attributes of today's grantors, Traditionalists and Boomers, and the attributes of their beneficiaries, Gen Xers and Millennials. Changes in marital practices and family structures may also accentuate these differences. The good news is that the divide is less constrained by the impact of transfer taxes.

Let us consider the reasons why trusts exist and how these find expression in the trust agreement. Those of us who serve as in-house fiduciary or trust counsel review a great number of trust agreements, but rarely do we see trusts that *explicitly* state their purpose. Rather we infer that purpose by reference to various provisions relating to the four basic elements of a trust: its custody, administration, management, and distribution functions. That inference often leads to predictable conclusions:

e.g., a trust which mandates income distributions to a spouse is likely to be a QTIP Trust under Internal Revenue Code Section 2056 (b)(7), or a trust with Crummey withdrawal provisions is probably an irrevocable life insurance trust, complying with Code Section 2514(e). More troubling may be the inference that a trust with ascertainable discretionary standards (such as *health, education, maintenance and support*) implies that the grantor intended only modest benefits for her beneficiaries.

On a deeper level, what if grantors were encouraged and equipped to communicate to both their fiduciaries and their beneficiaries about why they entrusted their financial capital to the trustees and for their beneficiaries? That communication might take the form of something we call a Statement of Intent. Such a Statement can assist fiduciaries with the challenges of mediating the divide between grantor intent and beneficiaries' expectations. That divide is sometimes substantial enough that it leads to attempts to terminate a trust and, of course, it leads to more routine conflicts in the administration of trusts.

The early termination of a trust may be permissible as long as it doesn't run afoul of a trust's *material purpose.* This concept harkens back to an 1889 Massachusetts case which laid the foundation for the Claflin doctrine.[84] That doctrine has found ample expression in the provisions of the Uniform Trust Code, where a number of actions require a fiduciary to elucidate a trust's material purpose.[85] What might be gained if a trust's material purpose were less a matter of inference and one more of explicit expression?

This is the concept behind a Statement of Intent, and such a Statement would be directed to two audiences. First, the trustee. For a trustee, a Statement of Intent is neither an external letter of wishes nor internal precatory language. Rather it is language within the trust document itself which expresses the grantor's unique personal rationale for that trust's purpose. It also addresses the grantor's views about the life span of the trust and may speak to the fiduciary in its exercise of various discretionary powers.

In a period where fiduciary responsibility is being more widely allocated, there is often more than one fiduciary. Among them are trust protectors who often hold latent powers whose exercise may lie decades in the future; what will guide them in the exercise of those powers? I believe that a Statement of Intent could be an excellent source of guidance.

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84 Claflin v. Claflin, 20 N.E. 454, 455-56 (Mass. 1889).

85 *See, e.g.*, UNIF. TRUST CODE § 111 (UNIF. LAW COMM'N 2000) (Non-Judicial Settlement Agreements), § 411 (Modification or Termination by Consent), § 412 (Modification or Termination Because of Unanticipated Circumstances).

The second and perhaps more important audience is the trust beneficiaries themselves. It's easy to forget that trusts are a form of communication and, indeed, often the last communication from a grantor. How many times have we seen beneficiaries thumbing through a trust agreement looking for something? The cynic in us would say we know exactly what they are looking for: They are looking for their name and a dollar sign after it. I think some of them are looking for something more elusive. They are looking to see whether or not the grantor said something to them. We must remember that there are no two-way conversations at the graveside.

A Statement of Intent addressed to beneficiaries is neither an ethical will (that's something outside the trust document that conveys family values) nor is it a family mission statement. Rather a Statement of Intent speaks to why family wealth is held in trust, providing insights about family values, and expressing hopes for the beneficiaries. We, of course, cannot author these but we can encourage our clients to do so. A good resource is a recent article in Trusts and Estates magazine by Raymond Odom, "Statements of Wealth Transfer Intent" which discusses Statements of Intent and offers guidance on their content and preparation.[86]

Statements of Intent are especially important in this era of perpetual trusts, which is made possible, of course, by the widespread repeal of the rule against perpetuities, recently refueled by the doubling of gift and GST tax exemptions. Perpetual trusts will "speak" to multiple generations of beneficiaries, many of whom will never have met their grantor. That audience of beneficiaries will grow ever larger.

We began a study in 2011 looking at asset growth in trust portfolios, trust design and distribution history, taxation of trust earnings and last, family growth.[87] Several colleagues who participated in formulating the study are in the audience today. We focused on family growth by looking at the total fertility rate in the United States. By the fifth generation in a typical American family, their perpetual trust would have 28 living beneficiaries.[88] And if the trust were to last as long as one of our clients hoped, (a dynasty trust he established in the late 1990s, intended to last 600 years, which in many respects seems unimaginable) in 600 years, the 19th generation of this family would give birth to 524,288 benefi-

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86 Raymond C. Odom, *Statements of Wealth Transfer Intent*, 151 TR. & EST., May 2012, at 56-62.

87 R. Hugh Magill, *Long-Term Trust Design: Drafting for the Long Haul*, N. TR. CO., http://www-ac.northerntrust.com/content//media/attachment/data/brochure/1205/document/Professional_Advisor_Forum_Outline_050212.pdf (May 2, 2012).

88 *Id.* at 5.

ciaries.[89] That trust will be functioning more like a pension plan or a small, private social security system.

Trusts designed to *run past the rule* will have to have a very thoughtful set of beneficial interests: from income and discretionary principal distributions, to withdrawal rights, to powers of appointment, the "bells and whistles" of a trust which are vitally important to all beneficiaries.

Among these are discretionary distributions, the standards for which are, of course, the heart of a trust. These standards span a continuum, from the very narrow (such as *emergencies*) to the very broad (such as *pleasure*). The distinction between ascertainable and non-ascertainable standards has fulfilled an important purpose in insulating trustee/beneficiaries from the risk of estate tax inclusion, but at what cost? Informal surveys that we have conducted with estate planning attorneys would indicate that there is a wider use of ascertainable standards than what is necessary for tax purposes.

Fiduciaries who must cope with new circumstances, new family structures, many of which grantors could not anticipate, welcome broader discretionary standards, and the greater flexibility they allow in achieving the purposes of the trust.

Let me offer a final observation on substantive trust design concerning spray or sprinkle trusts. I believe that these trusts have limited utility for contemporary families. We all understand their advantages: they permit unequal but equitable distributions; they offer efficiencies in the comingling of assets; they are very useful for minor beneficiaries of the same degree. But they present fiduciaries with multiple challenges. One of these is that of competing fiduciary duties, such as the duty of confidentiality as to each beneficiary and the duty to provide information to all beneficiaries. Spray trusts can also present insurmountable difficulties in building a trust portfolio which is well suited to each beneficiary's unique risk tolerance and marginal tax rate. I have a simple rule of thumb about spray trusts: if beneficiaries can't live together in the same house, they shouldn't live together in the same trust.

We all know that there is a wide range of general trust provisions which are often based upon standard form language. Several of these provisions could benefit from reevaluation when drafting trusts for modern families. Let me just highlight one or two. First, the administration of a trust during the period when a grantor becomes disabled: Some would say it is the most difficult period in a trust's administration. Management of a trust during that phase is often one where dependents seem to incarnate themselves spontaneously, raising the issue of how to determine whether or not these newcomers are really dependents. Does

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89 *Id.*

the trust agreement allow the trustee the latitude to either recognize them or exclude them in a way that is consistent with the reshaping of the American family and its relationships? Is the standard discretionary language aligned with each grantor's unique intent regarding her family and its support?

Another area for reconsideration is that of trust investments. The Prudent Investor Act (which was promulgated in 1994) could not possibly anticipate developments in socially responsible investing; but beneficiaries, particularly Millennials, are increasingly interested in and strongly devoted to the ethical aspects of investing, and they expect their trustees to follow suit.[90] Socially responsible investing is a complex issue for fiduciaries, but trusts for younger generations of beneficiaries will do well to address this issue.

Let me close this topic with some imagery about the role of trustees. In simpler times, the trustee's role seemed relatively straightforward. Grantor intent was expressed in a trust agreement which endowed the trustee with a set of fiduciary responsibilities. These responsibilities were to be exercised for two sets of beneficiaries to whom the trustee owed duties: the current and the remainder beneficiaries. It seems simple, but so much has changed.

Today fiduciary responsibility is being reallocated broadly pursuant to statutes such as administrative or directed trustee statutes, the most recent of which was promulgated by the Uniform Law Commission.[91] There is an increasing array of statutory powers, including new discretionary powers, which trustees may exercise in order to adapt a trust to wide ranging and changing circumstances. Trust documents now often grant trustees broad powers to fundamentally alter much of a trust's original design. The fiduciary's domicile looks suspiciously like a mystical pentagram. Fortunately, it's only a hexagram: there are three points of fiduciary obligation (to the grantor and to current and remainder beneficiaries) and three sources of fiduciary authority (emanating from the trust agreement and trust statutes). The complexity of this alignment is much needed as trustees navigate a period of vast demographic change.

VII. Longevity Trends

This more complex fiduciary landscape arches over what seems to be an inexorable trend of increasing life expectancies of both grantors

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90 Adam Shell, *Millennial 401(k)s: A Peek Inside Their "Socially Responsible" Investments*, USA Today, May 11, 2018, https://www.usatoday.com/story/money/2018/05/11/millennials-socially-responsible-investing/580434002/.

91 Unif. Directed Trust Act (Unif. Law Comm'n 2017).

and their beneficiaries. The upward trend in life expectancy presents extraordinary challenges. First is how and by whom will our elderly be cared for. Throughout history, elders have been cared for by younger relatives, in intra-generational family systems. A growing challenge globally is that there are not enough younger family members who can either provide that care directly or subsidize it through transfer payments to government systems that finance the costs of elder care. The ratio of younger children to older people globally has been decreasing steadily since the 1960s.[92] This phenomenon is the result of very low levels of reproduction in Western Europe, Japan, and especially China, with its disastrous one-child policy. In China, this has led to a phenomenon called an inverted family tree - four grandparents, two parents, and one child. The phenomenon is so severe that Chinese parents are now allowed to take legal action against children if they fail to maintain contact or send money.[93] The need for elder care will be exacerbated by a rising incidence of dementia, which sadly accompanies longer lifespans.

An intriguing aspect of this phenomenon of elder care is the difference in cultural perspectives about who should be responsible for the elderly: the elderly themselves; their families; or the government. There are dramatic differences among countries and cultures. In Pakistan, for example, 77% of respondents believe that elder care is a family responsibility.[94] In South Korea, on the other hand, 53% say elders should take care of themselves.[95] In Russia, 63% expect the government to fulfill this responsibility.[96] In the United States, 46% say the elders themselves should be responsible for their own wellbeing, 28% say families and 24% say government.[97]

We have been fortunate in the United States that the total fertility ratio, while significantly lower than its peak in the late 1950s, is holding close to the replacement level.[98] Only in the last couple of years has the rate dipped below 2 to about 1.8. It's important to note, though, that these favorable reproduction data in the United States are driven signif-

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92 *World Population Prospects: The 2010 Revision*, *Volume 1: Comprehensive Tables* (2011), UNITED NATIONS DEP'T ECON. & SOC. AFFAIRS (POPULATION DIV.), https://www.un.org/en/development/desa/population/publications/pdf/trends/WPP2010/WPP2010_Volume-I_Comprehensive-Tables.pdf.

93 TAYLOR ET AL., *supra* note 8, at 83.

94 Rakesh Kochar et al., *Attitudes About Aging: A Global Perspective*, PEW RESEARCH CTR., at 20 (2014), https://www.pewresearch.org/wp-content/uploads/sites/2/2014/01/Pew-Research-Center-Global-Aging-Report-FINAL-January-30-20141.pdf.

95 *Id.*

96 *Id.*

97 *Id.*

98 Gretchen Livingston, *Is U.S. Fertility at an All-Time Low? It Depends*, PEW RESEARCH CTR. (Jan. 18, 2018), https://www.pewresearch.org/fact-tank/2018/01/18/is-u-s-fertility-at-an-all-time-low-it-depends/ (last visited June 18, 2019).

icantly by two phenomena: immigration and immigrant reproduction. At current rates, 88% of United States population growth through 2065 will be driven by immigration and immigrant reproduction.[99]

Another way to look at this phenomenon of the relationship of elderly to other members of society is through the lens of dependency ratios, which show the balance of older individuals (ages 65 and older) to younger and middle-aged adults (ages 15-64), and the balance of children (ages 0-14) to younger and middle-aged adults. Old-age dependency ratios have been rising steadily since the 1950s, while child dependency ratios have been in decline.[100]

These statistics do not bode well for elder care in the United States, but there may be a solution: technology entrepreneur and artificial intelligence researcher Martine Rothblatt says, "Grandma and Grandpa need and deserve an attentive caring, interesting person with whom to interact. The only such person who can be summoned into existence to meet this demand are *manufactured software persons with robotic bodies, empathetic, autonomous robots with a physicality that mimics a flesh and blood person.*"[101] While I hope to age gracefully, I don't relish the notion of being cared for by a robot.

There are some difficult implications in these trends for Boomers and their children. First, the economic and employment challenges of the last ten years have brought many Millennials back to the nest. Millennials, though, will have more than ample opportunity to return the favor as their parents retire and rely upon Social Security and Medicare, the costs of which will increasingly be borne by the younger generation. Third, due to increasing lifespans and inadequate retirement savings, Boomers will be living out that old bumper sticker that says, "I am spending my children's inheritance." And fourth, owing to the widespread conversion of defined benefit pension plans to defined contribution plans, Millennials will have to fund their own retirements. And last, if they are fortunate to inherit something from their parents, there is a decent chance that a good portion of it will be income in respect of a decedent.

Before Millennials receive these inheritances though, they will have to see their parents though the difficulties near the end of their lives. We

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99 *Modern Immigration Wave Brings 59 Million to U.S., Driving Population Growth and Change Through 2065*, PEW RESEARCH CTR. (Sept. 28, 2015), https://www.pewhispanic.org/2015/09/28/modern-immigration-wave-brings-59-million-to-u-s-driving-population-growth-and-change-through-2065/ (last visited June 18, 2019).

100 *World Population Prospects: The 2012 Revision*, *Highlights and Advance Tables* (2013), UNITED NATIONS DEP'T ECON. & SOC. AFFAIRS (POPULATION DIV.) at 20, 30-32, https://population.un.org/wpp/Publications/Files/WPP2012_HIGHLIGHTS.pdf.

101 MARTINE ROTHBLATT, VIRTUALLY HUMAN: THE PROMISE—AND THE PERIL—OF DIGITAL IMMORTALITY 67 (2014).

know that there's too often inconsistency between what the elderly wish in those last chapters of life and what actually transpires. We also know about the importance of advance directives and the critical role they play in reducing that inconsistency. As lawyers, we see the conflict that can arise in families who must work through these issues. There is little research on this kind of intra-family conflict, but what there is suggests that a substantial portion of these families will be drawn into sustained interpersonal conflict. Why is this?

The first reason, I think, is probably obvious. There is often a lack of discussion about these issues in families. These are very difficult issues to discuss, and such a discussion may be compounded by the increasing complexity of contemporary family structures, as well as the natural evolution of any family: we raise children to be independent; they leave the nest; they may migrate to different states; they marry, enlarging the family; they may leave a faith tradition or join another faith tradition. End of life issues often bring family members crashing back together to discuss and decide these very weighty issues, too often without guidance and without the benefit of prior discussion.

There is, though, a little welcome news for many of us: there is a correlation between education level and cognition. For all of us who are lawyers and all who hold advanced degrees, the good news is that the more education you have the less cognitive decline you will experience throughout all stages of life.[102]

We have been exploring difficult topics and need to lighten it up just a little bit. So, let us talk about mortality. According to the Psalmist, "the length of our days is threescore years or perhaps, threescore years and ten or perhaps, fourscore.[103] The person known to have lived the longest in recent history was a supercentenarian named Jeanne Calment.[104] She died in France in 1997 at the age of 122.[105]

There is a group of Americans who are not interested in mortality; rather they are interested in overcoming it. Let me group them into four categories. I call them *evangelists, optimists, pessimists and realists*. Who are they? The *evangelists* are the so-called transhumanists, the *optimists* are the immortalists, the *pessimists* see the need for cryopreservation, and the *realists* are biologists and medical doctors.

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102 *Aging in the 21st Century*, *supra* note 71, at 42.

103 *Psalm* 90:10 (King James).

104 Carl Zimmer, *What's the Longest Humans Can Live? 115 Years, New Study Says*, N.Y. TIMES, Oct. 5, 2016, https://www.nytimes.com/2016/10/06/science/maximum-life-span-study.html.

105 *Id.*

One of the evangelists, transhumanist and U.S. presidential candidate Zoltan Istvan, and his friends are driving their Immortality Bus around the country. Here is a quote from Zoltan himself:

> I am hoping that my Immortality Bus will become an important symbol in the growing longevity movement around the world. It will be my way of challenging the public's apathetic stance on whether dying is good or not. By engaging people with a provocative, drivable giant coffin, debate is sure to occur across the U.S. and hopefully around the world. The next great civil rights debate will be on transhumanism.[106]

Let me turn to the immortalists. They are a different breed. They are highly intelligent, they have deep convictions, and many have extraordinary wealth. Here are several observations from immortalists. Martine Rothblatt, the Founder of Sirius XM, CEO and Chairwoman of United Therapeutics says, "Clearly, it is possible through technology to make death optional."[107] Aram Sabeti, a technology guru in Silicon Valley, says that "the proposition that we can live forever is obvious, it doesn't violate the laws of physics, we will achieve it."[108] And last, Dave Asprey, the CEO of Bulletproof, observes that "I decided I was just not going to die."[109]

What are the goals of this movement? One group believes that humans will overcome mortality through DNA manipulation. In this view, mortality is just a coding problem, and once we've learned how to recode DNA, we will solve biological mortality. Another group believes that humans will merge with artificial intelligence and transcend biological limitations.[110]

What are some of the organizations behind this? One is the National Academy of Medicine, which has instituted a project called the Grand Challenge in Healthy Longevity, with an award of $25 million for breakthroughs in longevity research.[111] Another is the SENS Research Foundation.[112] SENS is an acronym for Strategies for Engineered Negligible Senescence. Unity Biotechnology, which is doing research on se-

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106 Mark O'Connell, *600 Miles in a Coffin-Shaped Bus, Campaigning Against Death Itself*, N.Y. TIMES MAG., Feb. 9, 2017, https://www.nytimes.com/2017/02/09/magazine/600-miles-in-a-coffin-shaped-bus-campaigning-against-death-itself.html.

107 Tad Friend, *Silicon Valley's Quest to Live Forever*, NEW YORKER, Apr. 3, 2017, https://www.newyorker.com/magazine/2017/04/03/silicon-valleys-quest-to-live-forever.

108 Dara Horn, *The Men Who Want to Live Forever*, N.Y. TIMES, Jan. 28, 2018, https://www.nytimes.com/2018/01/25/opinion/sunday/silicon-valley-immortality.html.

109 Friend, *supra* note 107.

110 *Id.*

111 *Id.*

112 *Id.*

nescence, recently raised $116 million in capital from investors, including Jeff Bezos and Peter Thiel.[113] And last is Google, which launched its subsidiary, Calico, in 2013 with $1 billion in funding.[114] Calico's work is closely guarded, but it's believed to be performing research on the biomarkers of aging.[115]

Let us turn to cryopreservation; we need some pessimism. The pessimists believe that they may run out of time before the solution to mortality is achieved and thus, they intend to have themselves cryopreserved. There are three organizations which provide these services worldwide.[116] Two of them are based in the United States: the Alcor Life Extension Foundation[117] and the Cryonics Institute.[118] The Alcor Foundation and the Cryonics Institute are both 501(c)(3) nonprofit organizations, founded in the 1970s, each of which has about 150 patients in cryopreservation.

If you choose to be cryopreserved, you're going to want to ensure that you stay that way[119] and, when you come back, you have some spending money. So we are seeing a rather steady stream of cryopreservation trusts.[120] Allow me to share some language in these trust agreements, drawn directly from these trusts and only slightly modified to protect confidentiality. Their purposes include funding for cryopreservation and storage of *digital mind images*. A digital mind image is purported to be a comprehensive, digital replica of one's mind, which at some point in the future will be able to be downloaded into a bionic "person," who will then have the mind of that predecessor.

One such trust states that "during cryopreservation, the grantor will no longer be living but the grantor will nevertheless not be dead." Another trust would permit distributions to the grantor's Bionic Analog Version, or BAV, and this trust contemplates that if multiple BAVs of the grantor are revived, each will be entitled to discretionary distribu-

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113 *Id.*

114 *Id.*

115 *Id.*

116 *See* CRYONICS INST., https://www.cryonics.org (last visited June 18, 2019); ALCOR LIFE EXTENSION FOUND., https://alcor.org/ (last visited June 18, 2019); KRIO RUS, http://kriorus.ru/en (last visited June 18, 2019).

117 *About Alcor: Our History*, ALCOR LIFE EXTENSION FOUND., https://alcor.org/AboutAlcor/index.html (last visited June 18, 2019).

118 *About Cryonics*, CRYONICS INST., https://www.cryonics.org/about-us/ (last visited June 18, 2019).

119 Angelique Chrisafis, *Freezer Failure Ends Couple's Hopes of Life After Death*, GUARDIAN, Mar. 16, 2006, https://www.theguardian.com/science/2006/mar/17/france.internationalnews.

120 *The Alcor Patient Care Trusts*, ALCOR LIFE EXTENSION FOUND., https://alcor.org/AboutAlcor/patientcaretrustfund.html (last visited June 18, 2019).

tions, and each may live rent free in any trust property. It makes me wonder: how many BAVs can you have living in one home?

Most of these trusts are designed to terminate when the grantor is revived, and for one of these, the grantor posits that he "may be revived in this world or another world." My company has offices around the world but we haven't yet contemplated placing one on another planet. In yet another trust, upon revival, the grantor "will be considered to be a different legal person." This grantor had better hope that it's not more than 37.5 years after his initial demise or else he will become his own grandpa for GST tax purposes.

A final observation on these trusts: all of our laws (e.g., property, trust, tax, insurance) are designed for the living or the dead, but not the in-between. These trusts attempt to navigate those uncharted waters, the consequences of which are, at best, uncertain, and at worst, perilous.

Biologists and medical doctors do not share the view of immoralists. In their view, the best hope for this work and for our species is not to extend lifespans but to lengthen our years of healthy living, resulting in *improved health spans*.

Why have I taken us on this detour? Well, first, we needed a little break from some of the traditional trust and estate issues. More importantly, I think it is important to consider that estate planning, our fundamental craft, rests upon the biological fact of mortality. That fact in turn is grounded upon the theological tenets of every major world religion: we are mortal because of moral failure. In surveys of generational attributes, one intriguing statistic is the rate of religious disaffiliation. It has increased steadily across the generations, to the point where today, among Millennials it is in the 35% to 40% range.[121] I have the concern that not too far in the future, there will be a group of potential clients who see no need for estate planning, because they believe that they will live forever. Of course, until then, there are apps to keep you going *digitally* after you're gone such as Twitter LivesOn[122] and something called DeadSocial.[123] Those are not on my iPhone.

VIII. Collaboration and Decision-Making for Contemporary Families

Given the extraordinary changes in the structure of families and the attributes of the individuals who inhabit these structures, how will today's families come together to make decisions that every family must

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121 Taylor et al., *supra* note 8, at 164.

122 Will Coldwell, *Why Death is Not the End of Your Social Media Life*, Guardian, Feb. 18, 2013, https://www.theguardian.com/media/shortcuts/2013/feb/18/death-social-media-liveson-deadsocial.

123 *Id.*

make? Some of these decisions are really easy and enjoyable, such as making birthday and vacation plans ("Are we are going to Cabo or Cannes this year?"). Some are more challenging, such as those relating to the management of family foundations, shared assets, or family businesses ("Who gets to use the cottage over July 4th?" "How much money should we allocate to impact investing?" "Should we fire Junior because he's violated our employment policy . . . for the fifth time?"). And others, such as end-of-life decisions, are the most difficult ones we will face in our lives ("Should we maintain Mother's life support?").

These latter decisions have always been and always will be difficult, but for many in prior generations, they were made paternalistically. Today, though, the oldest generation must overcome the culture and habits of paternalism if they want Gen Xers and Millennials to be engaged. To do so, families must engage younger family members in their decision-making and cross the generational divide which may separate family members. As counsel, fiduciaries, and advisors, we are frequently called upon to help families bridge this gap.

The dialogue surrounding family wealth today is changing. In older generations, there was often no discussion about family wealth, but there were expectations and there were reactions to it. Boomers, though, are posing thought-provoking questions about wealth ("What meaning will we derive from our wealth?" "How will our children oversee family enterprises and manage them?" "When and how should we discuss wealth with our children and educate them about its responsibilities?"). Several years ago, another lawyer and I led a panel discussion at Northwestern University's Family Enterprise Institute, where we welcomed 100 closely-held business-owning families to a two-day symposium on a number of issues that affect family businesses, such as succession, estate planning, etc. In our presentation we wanted to explore the role that wealth played, qualitatively, in these families.

Two of the questions we posed to the older generation (who would have been Traditionalists), and their responses to those questions have always stuck with me. The first question we asked was, "at what age do you believe children should inherit the bulk of their financial wealth?" We gave them the ages of 18, 21, 25, 30 and 35. They began to vote and we were stunned that 53% of them said age 21. This was puzzling; perhaps this reflected an entrepreneurial view of wealth: capital should be transferred to the next generation of entrepreneurs to facilitate its continued investment. Ten minutes later, we posed a related question: at what age should families begin to discuss inheritance with their children? We gave them the same ages: 18, 21, etc. up to 35. They began to vote, and this time 56% said age 25. *Give them the money first and talk about it later.*

Boomers, though, are very interested in these conversations. They are facing support responsibilities; they covet advice on how to provide for elderly parents, and children, often at the same time. And in one of the most poignant issues we must address, they may become responsible for the ongoing care of a disabled adult sibling. Two generations ago, an American who was born disabled would not have a normal life expectancy. One generation ago, that individual may have lived longer, but usually lived in an institutionalized setting. Today, however, these individuals have lived lives of relative independence under the watchful care of their parents. As those parents age, how will they resolve the issue of who will provide continuing care for that child?

Modern families will also need counsel on how to allocate their financial wealth to and among a more diverse group of beneficiaries.

As the late Charlie Collier, author of *Wealth in Families*[124] has recognized, these issues and the family relationships they impact represent the greatest challenge for our families today. Charlie was the Senior Development Officer at Harvard University, a much sought-after family advisor who led for a number of years, with Kathy Wiseman, a wonderful postgraduate training program at Georgetown University at the Bowen Center for the Study of the Family.

Charlie is the individual whose multi-faceted concept of wealth suggests that we need to enlarge our wealth definitions beyond the balance sheet. When we discuss wealth, we usually think of only financial wealth, but in Charlie's view, families have four forms of wealth: Human capital — family members' gifts and attributes; Intellectual capital — how family members learn, relate to each other and achieve; Social capital — how families relate to their communities through volunteerism, philanthropy, or political involvement; and last, Financial capital — how will financial wealth enhance and grow the other forms of family wealth?

Each family's wealth is grounded in a unique set of values and aspirations. These find expression in various individual and shared activities and practices and, to the extent that families work together and share responsibility for those aspects of their wealth, family communications and governance become increasingly important. So how can contemporary families lay the best foundation for their work together? I would offer a five-factor approach. First, what's at stake, what kind of matter is at issue? Second, who are the members of our family; how do *we define family*? Third, who gets to be at the table? Fourth, what structures (if any, in some cases) surround our decision-making on particular issues? And fifth, where does the buck stop?

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124 CHARLES W. COLLIER, WEALTH IN FAMILIES (3d ed. 2012).

Let me explain the metaphor of the table with a brief story. I was working with a wealthy couple, a Boomer couple, a few years ago. This family was worth $150 million, the father and mother were in their 50s, and they had concerns about the impact of this wealth upon their Millennial children, a typical concern. We discussed their concerns and offered to work with them to develop a plan for educating their children about their wealth. To commence this process the father sent me a substantial PowerPoint presentation, a 24-page deck full of his observations about capitalism, independence, entrepreneurship, taxes, etc. I thought to myself, "I don't think the family had much to do with putting these principles together," but it was clear that both the father and mother wanted to share the insights with their children, but didn't know how to do so.

One issue which concerned them was where would they have this vital conversation. They asked, "Should we have it in your office or should we have it in our lawyer's office?" I responded with a simple question: "Where do you have the most important conversations in your family?" to which they both responded, "We have them at our dining room table." I then said, "That's where you'll have this conversation." They, indeed, went on to have that conversation (the first of many which followed) and these conversations laid the foundation for a much greater understanding of and engagement around the disposition of their wealth. What I drew from experience was the metaphor of the table at which these conversations occur.

In prior generations, the Study was the place where dad made his decisions. When Mom and Dad conferred, they may have made decisions at the Kitchen table. When the entire family discussed issues, they probably gathered around the Dining Room table. As family issues and affairs become more complex, however, families are likely to move to the Conference table, and finally they may be meeting in the Boardroom. As the family grows in size, as intergenerational participation expands, and governance and decision-making structures become more formal, the settings where families confer and make decisions must follow suit. This is necessary to ensure alignment with family goals, fairness, and conflict minimization, goals we all understand. We mustn't forget, though, that many of the most personal issues that families address should draw them back to the Dining Room and the Kitchen tables.

The discussions and dialogue around these issues is what we call *family wealth in action*, and I want to close with a story. I was fortunate to work with Charlie Collier 8 or 10 years ago, to advise a family in the midst of selling a closely held business. The father was wise to recognize that the sale of their business would be a seminal event within his fam-

ily, and he asked them to gather together around the holidays so that they could have a conversation about the impact of moving from a closely held business family to a family with liquidity and marketable assets.

Charlie and I worked to develop a plan involving a dinner with the family around their Dining Room table on the first evening, where we got acquainted and laid the foundation for a family session the next day. What occurred the next day has had a profound impact upon me. Charlie and I sat with this family in a conference room, at a U-shaped table. The father and son-in-law (who was the company's CFO) both had their laptops, as they were in the midst of negotiating the sale.

As the father and mother (nicknamed the *lion* and the *lioness* by their children) and children gathered around this table, we began by asking the father to "tell us a little bit about your family." The father began slowly to talk about his family, and as he began to share family stories, I realized that the pencils had gone down, the children were leaning in, and they were hearing important things.

An hour or so into this family storytelling the father began to speak about an aunt who had a particularly difficult life journey, and as he reflected on the challenges she had faced, he became overwhelmed and he broke down. I thought to myself, "Oh, my gosh, we have goofed up here, we have gone off the rails," but Charlie remained unruffled, saying, "We have been at this for a while, let's take a little break." So Charlie went out one door as I went out the other door. The *lioness* (whom I had met the first time at dinner the night before) beelined after me, and as she approached me, I saw that she, too, was weeping. She grabbed both of my hands and she said two things I have not forgotten: "*I have never heard these stories before*," and *"I have never seen this side of him.*"

What was happening in that room? This family was deepening their understanding of their *family system*, and they were using an age-old technique, as aged as our race, the telling of stories, to understand where they have come from, who they are, and what they value. This "work" would lay the foundation for how their financial wealth would inform the wellbeing of their family for generations to come.

While the composition of the families we serve today is undergoing dramatic change, each family is, of course, a group of individuals: individual human beings drawn together by love (and for the families we serve, by financial wealth) addressing the issues we all face over the course of our lives. As we counsel these families, we stand beside them at the intersection of their *heritage* (their distinctive place among the generations of their family) and their *legacy* (the yearning that there might be something permanent from their labors).

As counsel, as fiduciaries, we accompany each of these families, and we guide them at this vital intersection of heritage and legacy. It is what some would call a liminal space, a threshold. What a privilege it is and honor, as Fellows of the American College of Trust and Estate Counsel, to accompany and guide families at this intersection.

COMMENTARY AND DIALOGUE

Strengthening the Passivity Default

*Ian Ayres**
*Edward Fox***

In *The Prudence of Passivity*, Bryon Harmon and Laura Fisher (hereafter HF) argue that "passive management become the default approach for the investment of trust funds, to be abandoned only when circumstances specifically dictate the use of active management."[1] In this comment we argue that their thesis could be strengthened (i) by more clearly distinguishing between default law and default investment practices, (ii) by more clearly articulating their favored altering rules.

I. A Clear Legal Default

At times, HF use the term "default" to merely mean "standard" or "normal" as in their claim: "Traditionally, most trustees, like most investors generally, also seemingly view a conventional active management approach as the default approach (or even the exclusive approach) to investing trust funds."[2] But for legal scholars, the more relevant question is whether trust law imposes a default duty on trustees to invest passively. A default legal duty would bind trustees unless the default was displaced – which entails an analysis of trust law's altering rules.[3]

HF at other times seem to be using "default" to mean something close to a default legal duty. For example, when they assert, "[A]s a default approach, passive investing is more likely to meet a trustee's core duties: the duties of loyalty and prudence and their derivative obligations to administer the trust solely in the interests of the beneficiaries and to minimize costs and expenses."[4]

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1 Bryon W. Harmon & Laura A. Fisher, *The Prudence of Passivity: An Argument for Default Passive Management in Trust Investing*, 44 ACTEC L.J. 147 (2019).

2 *Id.* at 150; similarly see *id.* at 148.

3 Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 Yale L.J. 2032 (2011).

4 Harmon & Fisher, *supra* note 1, at 150; *see also id.* at 168 ("A default rule in favor of a passive investment approach will increase the likelihood that most trustees will achieve [the] fundamental goals integral to the fulfillment of their duties of loyalty and prudence . . . .").

This lack of clarity is perhaps emblematic of the state of trust law on this question. We have argued elsewhere[5] that the trustee's fiduciary duties should be read together to create a default duty not to invest actively, unless she separately calculates the costs of this strategy in terms of added risk and fees and reasonably concludes that investing actively will produce sufficient excess returns (or "alpha") to justify these additional costs. Our reading of the law accords with the Restatement (Third's) approach, whose official comments state,

> If the extra costs and risks of an [active] investment program are substantial, these added costs and risks must be justified by realistically evaluated return expectations . . . . [The] gains from the course of action . . . [must] reasonably be expected to compensate for its additional costs and risks.[6]

Under this reading of trust law, HF would be reiterating that the Restatement's current legal default is optimal. But as we have pointed out, the Restatement's presumption against active investing has not been adopted by courts in litigation. We found that "no court appears to have quoted or cited this comment since it was published in 1992."[7]

So a first way to improve the passivity default is to have more explicit judicial and statutory recognition that it exists. HF say that "passive investing is more likely to meet a trustee's core duties . . . of loyalty and prudence,"[8] but it would be useful for the law to more clearly recognize that active investing presumptively fails to meet a trustee's duty of prudence. A clear statement of a default duty of passive investing could take a form parallel to the trustee's duty under the UPIA to diversify "unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying."[9]

II. Clearer Altering Rules

The beauty of legal default rules is that they do not restrict freedom of contract. A settlor under a no-active investment default would still be

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5 Ian Ayres & Edward Fox, *Alpha Duties: The Search for Excess Returns and Appropriate Fiduciary Duties,* 97 Tex. L. Rev. 445, 496 (2019) (This rule would apply if the active investment in question would entail substantial costs in terms of under-diversification, excess fees, and/or sub-optimal exposure to market risk compared to a passive baseline.).

6 Restatement (Third) of Trusts § 90 cmt. h(2) (Am. Law Inst. 2007). This section was initially published in 1992, before much of the rest of the Third Restatement.

7 Ayres & Fox, *supra* note 5, at 497.

8 Harmon & Fisher, *supra* note 1, at 150.

9 Uniform Prudent Investor Act § 3 (Unif. Law Comm'n 1994); *see also* Restatement (Third) of Trusts § 90(b).

free to contract around the default and direct or authorize a trustee to invest actively.

But default rules necessarily have associated altering rules – the legal rules establishing the necessary and sufficient conditions for displacing or altering a legal default.[10] We believe HF would do well to more explicitly consider these altering rules. The Restatement comment quoted above already hints at a set of altering rules when it says "these added costs and risks must be justified by realistically evaluated return expectations."[11] This suggests that a trustee must undertake a cost-benefit analysis before displacing the passivity default and investing actively.[12] In addition, the trustee's existing duty to keep adequate records would also include contemporaneously recording the reasoning and calculations underlying this cost-benefit analysis.[13]

The problem with the Restatement approach is that it doesn't clarify how much expected alpha is necessary to justify the extra fees and necessary diversification losses of active investment.[14] We have attempted to quantitatively estimate the size of the expected alphas required to offset these costs. We find that an average investor would need to expect to beat the market each year by 6-15% to entirely forego the benefits of diversification and invest solely in a single stock.[15] In addition, we find that during times of crisis, trustees need higher expected

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10 Ayres, *supra* note 3, at 2033.

11 RESTATEMENT (THIRD) OF TRUSTS § 90 cmt. h(2).

12 One small quibble that we have with HF's analysis of this section is their claim: "Logically, therefore, the costs associated with active management are not justified unless they realistically can be expected to produce returns in excess of their necessarily higher fees or provide a diversification benefit not otherwise available." Harmon & Fisher, *supra* note 1, at 173 (citation omitted). The authors' suggestion that active management can "provide a diversification benefit not otherwise available" misunderstands both the Restatement and modern portfolio theory. Active investment necessarily sacrifices diversification, because the process of selecting a subset of investments that one believes will beat the market entails exposing the portfolio to some idiosyncratic risk. *See* Ayres & Fox, *supra* note 5, at 449, 463-64 ("Actively managed funds . . . require some diversification sacrifices because the fund managers must pick a limited number of firms that they believe will outperform the market."). The Restatement approach implicitly reflects this by requiring trustees to justify taking on both the "extra costs and risk" of active investment. RESTATEMENT (THIRD) OF TRUSTS § 90 cmt. h(2).

13 As discussed in Ayres & Fox, *supra* note 5, at 499, many professional fiduciaries already have investment protocols that require this kind of alpha justification for underdiversified portfolios with single holdings making up more than 10 or 20% of the trust's assets.

14 *See id.* at 497. We observed there that perhaps the failure of courts to cite the Restatement "is not surprising: before our work [in *Alpha Duties*] there have been few attempts to systematically estimate the size of offsetting alphas, and these figures are needed to make the calculations that the Restatement seems to call for." *Id.*

15 *Id.* at 449.

alpha in order to justify the reduced diversification of active investment, with alphas rising to 9-18% per year.[16] The increased costs of active investment during times of market upheaval make it especially important that the reasonableness of active investment, as with other aspects of the duty to invest prudently, be evaluated "at regular intervals to ensure that they are [still] appropriate."[17] Likewise, high fees charged by active managers must be offset by alphas equal to the excess of those fees above those charged by passive funds.[18]

Any analysis of investing in actively managed mutual funds should include a consideration of the extent to which the funds are pursuing "closet index" strategies. Martijn Cremers and Antti Petajisto estimate that a substantial number of funds claiming to be actively managed persistently achieve returns that correlate strongly with passively managed funds.[19] Their "active share" measure provides an estimate of what portion of a fund's portfolio is really actively managed from an economic perspective and this measure is freely available for thousands of mutual funds.[20] Understanding the active share proportion is essential to assessing whether the fund fees are "alpha justified," because a fund that is charging a 1% annual fee, but only actively invests 50% of its portfolio is in effect charging close to a 2% annual fee on the actively managed proportion of its portfolio.[21] Cremers and Petajisto find that "funds with the lowest Active Share have poor benchmark-adjusted returns and alphas before expenses (between 0.11% and -0.63%) and do even worse after expenses, underperforming by -1.42% to -1.83% per year."[22]

The altering rules discussed above would be sufficient to stamp out imprudent active investment of trust assets in an ideal world. Trustees

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16 *Id.*

17 *Compare* Harmon & Fisher, *supra* note 1, *with* Tibble v. Edison Int'l, 843 F.3d 1187, 1197 (9th Cir. 2016) (en banc) (citations omitted) (quoting AMY M. HESS, GEORGE G. BOGERT & GEORGE T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 684, at 147–48 (3d ed. 2009)) (internal quotation marks omitted).

18 While HF are correct that a trustee has a duty to minimize fees, we think it makes more sense to consider the prudence of active management after considering all the costs of such a strategy together including excess fees, under-diversification, and potentially taking on the wrong amount of market risk.

19 K.J. Martijn Cremers & Antti Petajisto, *How Active is Your Fund Manager? A New Measure that Predicts Performance*, 22 REV. FIN. STUD. 3329 (2009).

20 ACTIVESHARE, https://activeshare.info/ (last visited May 31, 2019).

21 For example, the authors estimate that the fee on the active portion of the Fidelity Advisor Dividend Growth Fund is 1.67% even though its expense ratio is just 1%, because it is estimated to actively invest just 60% of its portfolio. *Fidelity Advisor Series I: Fidelity Advisor Dividend Growth Fund*, ACTIVESHARE, https://activeshare.info/fund/fidelity-advisor-series-i-fidelity-advisor-dividend-growth-fund (last visited May 31, 2019).

22 Cremers & Petajisto, *supra* note 19, at 3329. *See also* Sam Mamudi, *What Are You Paying For?,* WALL ST. J., Dec. 8, 2009, https://www.wsj.com/articles/SB10001424052748704402404574529550789419572.

would only invest actively if the excess returns outweigh the costs of using such a strategy. In fact, there are a variety of reasons why we might expect this perfect deterrence to go awry. For example, settlors and trustees may lack sufficient knowledge about the costs and benefits of active investment to make fully informed choices. Moreover, the difficulty of evaluating such decisions ex post may provide cover for uninformed or even conflicted decisions by the trustee to invest actively. As a result, courts or legislators may wish to add procedural requirements to the altering rules to make them more effective.

Courts might establish a "cautionary" altering rule, mandating that to be effective, a trust instrument opting out of the default duty to invest passively must indicate that the settlor has been apprised of and understands the alpha tradeoff relevant to active investment and possibly the initial estimates of expected costs (fees and diversification losses) and benefits (expected alpha) of active investment. At a minimum, the trustee could disclose the expected alpha required to offset fees and diversification losses during crisis and non-crisis periods.[23]

Trust law might go further and require settlors to pass a sophistication test before authorizing trustees to eschew passive investing. We suggested a similar prerequisite concerning non-diversified ERISA investments:

> This testing requirement is an example of an altering rule that "reduces the likelihood of error by requiring individuals to demonstrate actual knowledge of the issues related to opt out before they can deviate from the status quo."[24] Train and test altering has been deployed in other high-stakes settings (such as student loans and human-subjects approval) and has been recommended for testing securities sophistication.[25]

Settlors who demonstrate by passing the test that they are aware of the kinds of tradeoffs entailed by active investing would be free to have their trustees seek alpha in ways that exposed the trust beneficiaries to some mixture of diversification, exposure, or excess-fee losses. But this procedural altering rule pre-requisite would beneficially impede many settlors from ill-advisedly agreeing to active trust investment.[26]

In addition to testing for settlor sophistication, it might be worthwhile to only allow active investing by trustees who are able to pass a

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23 *See* Ayres & Fox, *supra* note 5, at 494.

24 Ian Ayres & Quinn Curtis, *Beyond Diversification: The Pervasive Problem of Excessive Fees and "Dominated Funds" in 401(k) Plans*, 124 YALE L.J. 1476, 1525 (2015).

25 Ayres & Fox, *supra* note 5, at 513-14 (some citations omitted).

26 The possibility of a sophistication test is also explored by Ayres and Curtis in *Beyond Diversification*, *supra* note 24, at 1525, albeit without testing participants' knowledge of alpha tradeoffs.

test concerning alpha tradeoffs.[27] Just as there are licensing tests for both broker–dealers and investment advisers, we might require trustees who invest actively to demonstrate some enhanced financial acumen. FINRA currently requires both broker–dealers and investment advisers to pass exams that include sections covering the suitability requirement, which is akin to the duty of prudent investment.[28] But the questions on these exams fail to test applicants on whether failures to diversify or take appropriate levels of risk or to minimize investment fees can be justified by expectations of excess returns. Trust testing could assure that trustees have both a theoretical and empirical understanding about the central tradeoffs entailed in active management. For example, they should not only know theoretically that some alpha is required before sacrificing the benefits of diversification (and that it tends to increase during crisis periods), but they should also know empirically what order of magnitude this alpha must be for beneficiaries of different levels of risk aversion. They should be tested on what alpha is required before taking on too much or too little market risk. And, most simply, they should know that any superficially excessive fees on an actively managed mutual fund must be justified by even higher alpha expectations.

Last, the altering rules should be sensitive to conflicts of interest. HF argue conflicts of interest are a main reason why active management persist in trusts.[29] Their concern about conflicts makes sense in general. Conflicts of interest seem to drive many of the worst decisions to invest actively. For example, brokers often recommend retail investors choose actively managed mutual funds which underperform but pay the brokers high commissions.[30] This costs retail investors billions of dollars a year.[31]

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27 Ayres & Fox, *supra* note 5, at 510 make an analogous proposal regarding enhanced testing of brokers-dealers and investment advisers.

28 *See id*. Before recommending transactions involving stocks, bonds, and a variety of other securities, broker–dealers must, inter alia, pass a 6-hour Series 7 exam. *Series 7: General Securities Representative Exam*, FIN. INDUS. REGULATORY AUTH., http://www.finra.org/industry/series7 (last visited May 31, 2019). Conversely, investment adviser representatives must pass a 3-hour Series 65 exam. *Series 65: Uniform Investment Adviser Law Exam*, FIN. INDUS. REGULATORY AUTH., http://www.finra.org/industry/series65 (last visited May 31, 2019). See Michael Kitces, *Are the Licensing and Other Requirements to Become a Financial Advisor Too Easy?*, KITCES (Aug. 24, 2015), https://www.kitces.com/blog/are-the-licensing-and-other-requirements-to-become-a-financial-advisor-too-easy/ for the License Requirements.

29 Harmon & Fisher, *supra* note 1, at 173-76.

30 *See* Ayres & Fox, *supra* note 5, at 452, 503.

31 The Council of Economic Advisers concluded that brokers' conflicted promotion of actively managed funds cost retirement savers alone $17 billion per year. *See* COUNCIL OF ECON. ADVISERS, THE EFFECTS OF CONFLICTED INVESTMENT ADVICE ON RETIREMENT SAVINGS 10–11, 13 tbl.4 (2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_coi_report_final.pdf. Indeed, there is evidence that broker-sold mutual

Trustees, in contrast with brokers, are subject to a strict duty of loyalty. In addition, many trustees are compensated on a fixed percentage of the trust assets, which will usually align the trustee's incentives with beneficiaries in terms of not paying excess fees to outside managers. HF argue nevertheless that corporate and professional trustees may still be incentivized to manage actively to benefit "their sales and marketing departments."[32] To the extent that these arrangements do not violate the duty of loyalty, the test for determining whether the passivity default has been reasonably displaced should factor in this conflict. For example a trustee who—after analyzing the costs and benefits—chooses to invest with an actively managed mutual fund run by the trustee's subsidiary would be scrutinized more carefully than if the trustee chose another actively managed fund with similar fees and risks but from which the trustee could not in any way benefit.

III. Conclusion

HF have a worthy target. There is undoubtedly excessive active investing of trust assets. Enlightened strengthening of a passive investing default together with well-designed altering rules can preserve contractual freedom while channeling assets toward lower fees and better diversified investments.

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funds account for the bulk of the under-performance of actively managed mutual funds. *See* Diane Del Guercio & Jonathan Reuter, *Mutual Fund Performance and the Incentive to Generate Alpha*, 69 J. Fin. 1673 (2014) (finding broker-sold funds substantially underperform but that actively managed funds sold directly to investors do not under perform passive indices).

[32] It would be useful for HF to be a bit more specific about the types of compensation arrangements which they believe are most problematic. They seem to be referring to trustees' ability in most states to invest trust assets in mutual funds operated by the trustee or an affiliate or to take reasonable management fees directly from the trust corpus. Harmon & Fisher, *supra* note 1, at 152 n.17. *Cf.* Jesse Dukeminier & Robert H. Sitkoff, Wills, Trusts, and Estates 593 (Wolters Kluwer Law & Bus., 9th ed. 2013).

Brief Comment on Trustee Prudence and Passive Investing

*C. Raymond Radigan**
*Jennifer F. Hillman***

The recent article *The Prudence of Passivity: An Argument for Default Passive Management in Trust Investing*[1] (the "Article") undertook a detailed review of the development of financial scholarship regarding investment practices and legal scholarship addressing the evolution of fiduciary duties. The Article reviewed whether a passive approach (or utilization of indexing) is encouraged or even required by law in order for a fiduciary to meet their fiduciary duty. The Article concluded with a recommendation that a passive investment strategy should be the default standard for corporate and professional trustees.

This response is not meant as an expansive review of the Article's arguments concerning portfolio construction. Instead, the authors would like to briefly address one foundational premise as a reminder to all practitioners. It is crucial for fiduciaries to understand that Mr. Harmon's and Ms. Fisher's sophisticated analysis, and their discussion of "passive investments" refers solely to the construction of an investment portfolio and not a trustee's fundamental approach to his or her task. A trustee utilizing a passive investment strategy should not confuse the use of the term "passive" with their fiduciary duty and obligations in managing a portfolio. An index fund may relieve some of the burden on a trustee because the trustee may not need to undertake extensive research and analysis on the market for individual stocks. Yet, a trustee's fiduciary duty still requires the trustee to undergo sufficient research and analysis to ascertain whether a particular index is a good fit for the needs of a trust and its beneficiaries.

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[1] Bryon W. Harmon & Laura A. Fisher, *The Prudence of Passivity: An Argument for Default Passive Management in Trust Investing*, 44 ACTEC L.J. 147 (2019).

The concept of prudence in trustee investing has significantly evolved over the last fifty years.[2] Throughout this time, there have been enormous rises in stock markets and increased inflation, as well as recent bouts of extreme volatility in financial markets. Individual investors have found it difficult at times to navigate the changing markets. Trustees have the additional burden of their heightened standard of care and fiduciary duty owed to the beneficiaries of the trusts they administer.

As stated by Justice Samuel Putnam in *Harvard College v. Amory*, "[a]ll that can be required of a trustee to invest, is, that he shall conduct himself faithfully and exercise a sound discretion."[3] The ideas from this seminal case eventually became known as the Prudent Investor Rule which focuses on the process of how a trustee makes an investment choice, not the results.

In trustee investing in New York, nothing is prudent or imprudent, *per se*. The needs of each trust are different, and each trust's investment strategy is different. Moreover, the needs of each trust should be analyzed and reviewed on a periodic basis, or more frequently as necessary. A prudent trustee thus is never truly passive in determining how to construct a portfolio. Even if a passive investment product is utilized, a trustee may need to actively select the index, monitor its performance, or revisit asset allocations in response to changed market conditions or beneficiary needs. The investments themselves may be "passive" but the trustee is not.

Based upon anecdotal evidence, it appears that many investment advisors and corporate fiduciaries do use indexing and index funds for trustee investments; however, (and most importantly) these individuals remain "active" investors. This includes selecting an index, managing it and sometimes deviating from the index. The trustee or investment advisor actively manages, reviews and analyzes the selected index fund. Even if the investment result is not the desired result, the trustee or investment advisor has complied with the mandates of the Prudent Investor Rule by this repeated analysis and constant review. In many instances it may be preferable and prudent to utilize indexes. Regardless, a trustee must "actively" undertake that periodic (or more frequent) analysis.

Essentially, this comment focuses on a question of semantics, with the authors finding some concern with the oft-used term of art "passive investing." The "active" part of the fiduciary's role – the selection of

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[2] *See generally* C. Raymond Radigan & Jennifer F. Hillman, *The Evolution of Prudence in Trustee Investing*, N.Y. L.J., July 9, 2013, https://www.law.com/newyorklawjournal/almID/1202609889391/?slreturn=20190513114340.

[3] 26 Mass. 446, 461 (1830).

the portfolio, be it indexes or otherwise, and the periodic review of performance against the needs of the Trust – is the single most important task that a trustee undertakes in order to comply with the Prudent Investor Rule.

Prudence of Passivity vs. Prudence of Process: Can a Default Approach be Prudent?

*Elisa Shevlin Rizzo**
*Erica E. Lord***

In *The Prudence of Passivity: An Argument for Default Passive Management in Trust Investing*,[1] Bryon W. Harmon and Laura A. Fisher argue that trustees should adopt a default passive investment approach in *most* circumstances to better fulfill the trustee's mandate to balance risk and return objectives reasonably suited to the trust. Their critique of active management presents the notion that use of active investments implicates a trustee's fiduciary duty of loyalty.

While Harmon and Fisher advance a strong case in favor of passive investing, we decline to adopt a default rule. Consistent with the Prudent Investor Rule (the "Rule"), we posit that a fiduciary's duty is to develop a strategy suitable for the unique trust presented, and under this approach, passive, engineered, alternative and select active strategies may all play a role in a prudently constructed, diversified trust portfolio.

I. Prudence of Process

As Harmon and Fisher note, with the development of Modern Portfolio Theory ("MPT"), the law governing trust investments underwent a dramatic shift away from the old "legal list" and "prudent man" rules that emphasized individual security selection and towards an approach which focused on risk management within the context of the total portfolio.[2] The Rule requires a trustee to invest and manage trust assets as a prudent investor would, considering the purposes, terms, distribution re-

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1 Bryon W. Harmon & Laura A. Fisher, *The Prudence of Passivity: An Argument for Default Passive Management in Trust Investing*, 44 ACTEC L.J. 147 (2019).

2 *See, e.g.*, Max M. Schanzenbach & Robert H. Sitkoff, *The Prudent Investor Rule and Market Risk: An Empirical Analysis*, 14 J. Empirical Legal Stud. 129 (2017).

quirements and other particular circumstances related to the trust.[3] Critical to this function is the development of "an overall investment strategy that incorporates risk and return objectives reasonably suitable to the trust."[4] Factors to be considered include (i) overall trust objectives, (ii) general economic conditions, (iii) possible effect of inflation or deflation, (iv) expected tax consequences, (v) role each investment plays within the overall portfolio, (vi) expected total return, (vii) liquidity needs, regularity of income and preservation or appreciation of capital and (viii) an asset's special value or relationship to the trust or beneficiaries.[5] In our view, a default, fully passive approach is in tension with the Rule's "strategy" requirement and these enumerated factors. The Rule's emphasis on process over prescription recognizes that a trustee cannot be judged on investment returns in hindsight, particularly in an industry continuously developing new approaches, vehicles, and products.[6]

II. The Premises Underpinning Passivity

We question several of Harmon and Fisher's fundamental premises, namely that (i) active management is the default approach employed by *most* professional trustees, (ii) professional trustees utilize active management for their own business considerations rather than for the benefit of the beneficiaries, (iii) most trustees seemingly begin with a blank slate of investments, and (iv) the only acceptable investment strategies are passive or active.

In an industry constantly introducing new investment products, it is critical to define what *passive investing* actually means. In some cases, Harmon and Fisher seem to allow passive strategies as appropriate if they are index funds tied to a particular benchmark within an asset

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3 The Prudent Investor Rule is embodied in the Restatement (Third) of Trusts § 227 (Am. Law Inst. 1992), which was superseded by the Restatement (Third) of Trusts § 90 (Am. Law Inst. 2007) (the "Restatement") and the Uniform Prudent Investor Act (Unif. Law Comm'n 1994) [hereinafter UPIA]. The full text of the UPIA and a complete list of states that have adopted it are available at https://www.uniformlaws.org/committees/community-home?CommunityKey=58f87d0a-3617-4635-a2af-9a4d02d119c9 (last visited June 3, 2019). States which have not adopted the UPIA but have adopted their own prudent investor statutes include New York (N.Y. Est. Powers & Trusts Law § 11-2.3 (McKinney 2019)), Florida (Fla. Stat. § 518.11 (2019)); and Delaware (Del. Code Ann. tit. 12, § 3302 (2019)). A complete list of those states is included in the *FDIC Trust Examination Manual, Appendix C- Fiduciary Law* available at https://www.fdic.gov/regulations/examinations/trustmanual/appendix_c/appendix_c.html#_ toc497113667 (last visited June 3, 2019).

4 Restatement (Third) of Trusts § 90(a); *accord* UPIA § 2(b).

5 UPIA § 2(b); *accord* Restatement (Third) of Trusts § 90(a). This language has been adopted by many state statutes. *See, e.g.*, 760 Ill. Comp. Stat. 5/5(a)(6) (2019).

6 Restatement (Third) of Trusts § 90 cmt. (b).

class.[7] In other cases, they acknowledge active strategies may be acceptable because they are akin to passive funds.[8] Under this malleable definition, the scope of passive investing, and thus the appropriateness of the fiduciary's behavior, is elusive. Is a trustee limited to investing in funds that match publicly-traded stocks or bonds tracked on widely-published index? Is a trustee prohibited from investing in a passive strategy designed to mirror a custom benchmark or offer exposure to a particular sector? Is a default passive standard not simply a return to the old legal list approach prescribing *per se* acceptable investments? The Prudent Investor Rule was carefully constructed to remedy the prohibitions, arbitrary limitations, and lack of flexibility resulting from the unworkable Prudent Man Rule.[9]

Even if the term "passive investing" could be better defined, commentators have noted that the wholesale endorsement of passive investment options is based "on the false premise that fiduciary oversight requirements are nearly eliminated" under a passive regime.[10] The proliferation of passive products in the marketplace still leaves trustees to decide among any number of products that may appear passive but might or might not be appropriate. Trustees should not be lulled into passivity without attention to appropriate indices, suitable benchmarks and ongoing monitoring.

III. Realities of Trust Administration

In advocating a default approach of entirely passive investments as *per se* prudent, the authors do not fully consider two factors that often play a critical role in practical trust administration: (i) the nature of the assets delivered to the trustee and (ii) the effect of taxes on overall investment returns. The standard of care embodied in section 2(b) of the Rule provides that "[a] trustee's investment and management decisions

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7 *See*, *e.g.*, Harmon & Fisher, *supra* note 1, at 149 (defining passive management as investing in mutual and exchange-traded funds that track and attempt to match major commercial stock exchanges or widely-published indices of publicly traded stocks or bonds).

8 *See, e.g.*, *id.* at 149 n.4 (acknowledging smart-beta funds as a form of active management but closely resembling passive funds enough to be considered passive for their purposes).

9 Restatement (Third) of Trusts pt. 6, ch. 17, intro. note (Am. Law Inst. 2007).

10 *See, e.g.*, Kevin Knowles, *Passive Management and the False Premise of Fiduciary Relief: Going Passive is an Active Decision*, Russell Invs. (2016), https://russellinvestments.com/us/insights/articles/passive-management-and-the-false-premise-of-fiduciary-relief (last visited June 3, 2019). Knowles notes that passive investments are driven almost completely by the index provider's methodology, so that even selecting among funds in the universe of passive investing requires active decisions by a trustee.

respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole."[11]

Many if not most wealthy families generate their wealth in large part from illiquid, concentrated, or closely-held investments.[12] Families often deliver these assets to a trustee, and increasingly, may direct or encourage the trustee to retain these assets. Often this practical reality can directly conflict with the Rule's emphasis on diversification. Absent express language in the governing instrument or a special relationship between the asset and the trust or trust beneficiaries, a trustee will be faced with the question of diversification.

Particularly when a trust holds a unique asset or concentration, a default passive approach may be difficult to square with the trustee's overall fiduciary duties. A diversification strategy "may be prudent, negligent, or grossly negligent, depending on the investments actually selected, the timing of asset sales or acquisitions, the goals of the trustor, and the factual circumstances surrounding the particular trust implicated by a specific diversification program."[13] Active or engineered investment solutions, such as an active strategy with a tax-harvesting component, may play a meaningful role in helping the trustee to diversify the initial funding assets in a tax-sensitive manner.[14]

A trustee must also navigate market conditions in developing an investment strategy. During periods of increased market volatility, a trustee may wish to hedge against market risk through the use of uncorrelated investments or strategies designed to blunt the effect of volatility. Depending on the other assets held in the trust, "the use of vigorous research and investigation to introduce assets from the less efficient

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11 UPIA § 2.

12 John C. Weicher, *The Distribution of Wealth in America, 1983-2013* at 6, HUDSON INST. (Dec. 2016), https://s3.amazonaws.com/media.hudson.org/files/publications/20170111WeicherTheDistributionofWealthinAmerica19832013.pdf.

13 *In re* Scheidmantel, 868 A.2d 464, 487 (Pa. Super. Ct. 2005). There, a trustee's decision to unilaterally diversify a concentrated stock position was held to constitute gross negligence. The trustee failed to consider (i) loss of income, (ii) diminution in value of trust assets, (iii) additional mutual fund management fees, and (iv) timing of sales and corresponding loss of dividends. The court noted that "[a]n investment decision that might be prudent for one client may be imprudent for another, and could constitute gross negligence of a third client if the circumstances surrounding that trust are dramatically different from those of the other clients." *Id.*

14 Steve Riley & Richard Furmanski, *Reexamining Tax-loss Harvesting: Better Results Through Enhanced Understanding*, TAX ADVISER: TAX INSIDER, Feb. 16, 2017, https://www.thetaxadviser.com/newsletters/2017/feb/reexamining-tax-loss-harvesting.html (last visited June 3, 2019); *see also* Ari I. Weinberg, *A Magical Tax-Loss Harvesting Machine?*, FORBES, Oct. 16, 2012, https://www.forbes.com/sites/ariweinberg/2012/10/16/a-magical-tax-loss-harvesting-machine/#317f02f747a5.

markets into the trust portfolio can be expected to contribute to its overall diversification and return objectives."[15]

With these practical realities in mind, the Rule provides that "[p]rudent investment principles also allow the use of more active management strategies by trustees."[16]

IV. Fees and Expenses

Harmon and Fisher rightly note that a trustee must consider the relative weight of expenses against associated return when embarking on any investment strategy. While the UPIA does not go so far as to require a trustee to *minimize* all costs, a trustee may only incur "costs that are appropriate and reasonable in relation to the assets, the purposes of the trust and the skills of the trustee."[17] The Restatement encourages trustees to make "careful cost comparisons" among similar investment products, and also notes that "[c]oncerns over compensation and other charges are not an obstacle to a reasonable course of action using mutual funds and other pooling arrangements, but they do require special attention by a trustee."[18] A trustee's decision to proceed with a program of extra costs and risks involves judgements by the trustee that the following criteria are satisfied:

> (a) Gains from the course of action will offset the additional costs and risks;
> (b) The proposed course of action is reasonable, both economically and in terms of its role within the portfolio; and
> (c) The trustee or manager has the necessary skills or access to the competence necessary to carry out the program.[19]

Overall, the Rule emphasizes a trustee must consider the benefits of an active strategy in overall diversification, the costs and risks involved, the basis for selecting an active manager, and "suitability" of the strategy to the particular trust.[20] We interpret these comments to mean that trustees must be mindful of increased expenses, but should consider incremental costs as one of several factors in the context of the trust's overall strategy and cost.[21] Constraining trustees to select passive invest-

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15 Restatement (Third) of Trusts § 90, cmt. h(2) (Am. Law Inst. 2007).

16 *Id.*

17 UPIA § 7. The comments go further: "Wasting beneficiaries' money is imprudent. In devising and implementing strategies for the investment and management of trust assets, trustees are obliged to minimize costs."

18 Restatement (Third) of Trusts § 90, cmt. h(2).

19 *Id.*

20 *Id.*

21 As investors have flocked to low-cost, passive funds over the last decade, fees for both actively and passively managed equity and bond funds have declined substantially.

ments solely with an eye toward cost minimization is inconsistent with the Rule.

V. Conclusion

It is our view that fiduciary investment management cannot be isolated from the particulars of a given trust (*i.e.*, the bespoke governing instrument, applicable governing law, res, and beneficiaries), and we caution against the wholesale elimination of any investment category or style. Endorsing "passive investing" absolutely as a default approach in the fiduciary context raises additional questions, including whether a wholly passive strategy can fulfill a trustee's duty to diversify in every case, whether the term "passive investing" can have a standard or static meaning, and whether adopting any default approach truly aligns with the Rule's emphasis on developing a strategy appropriate for the trust presented. We endorse a more flexible approach.

See Timothy Strauts, *5 Charts on U.S. Fund Flows that Show the Shift to Passive Investing*, Morningstar Blog (Mar. 12, 2018), https://www.morningstar.com/blog/2018/03/12/fund-flows-charts.html.

EVIDENCE:

HEARSAY AND ITS EXCEPTIONS

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ADMISSIONS

State of Ohio, 1995

U.S. District Court, Northern District of Ohio, 1996

U.S. Court of Appeals, Sixth Circuit, 2000

As chair of Reminger's estate, trust, and probate litigation practice group, you can expect an incredibly broad working knowledge of the areas of law that touch upon the disputes he routinely handles, coupled with a rare ability to quickly capture the factual essence of your claim. Adam has served as lead trial attorney in hundreds of successfully pursued/defended estate and trust disputes. He has tried many high stakes cases to verdict: will and trust contests, executor and trustee removal actions, interpretation of wills and trusts and ambiguities, accountings, breaches of fiduciary duty, and claims seeking to void gifts and beneficiary designations. Many of the cases he has handled are often cited in the courts throughout Ohio.

Adam is active in academia. He has taught the wills, trusts, and estate class at Cleveland Marshall School of Law and has been invited to lecture to many prestigious organizations, including the Ohio Association of Probate Judges, the American Academy of Forensic Psychiatrists and the Law, the American Academy of Trust and Estate Counsel, the Association of Certified Fraud Examiners and many bar associations. He believes successful advocacy requires skills such as fact development through deposition and story telling though cross examination as well as the ability to educate clients, parties, and the court about the nature of the claim and supporting law.

Representative Experience

The breadth of Adam's experience in matters related to the "World of Probate and Estates" is well known throughout the legal community. Over the approximate 20 years of almost exclusively handling probate, trust, estate, and guardianship type disputes, he has literally pursued and defended hundreds of cases and problems falling within his niche. His track record and client testimonials are demonstrative of his recognized skills in discovery, analysis, writing, and trial.

Honors & Recognitions

Rated AV® Preeminent™: Very Highly Rated in Both Legal Ability and Ethical Standards by Martindale Hubbell Peer Review

Listed in *Best Lawyers in America* for Elder Law and Litigation - Trusts and Estates, since 2009

Selected as *Best Lawyers* Lawyer of the Year 2015, 2018 – Litigation – Trusts and Estates – Cleveland

Selected as *Best Lawyers* Lawyer of the Year 2019, 2021 – Elder Law – Cleveland

Recognized as a Rising Star and as a Super Lawyer by *Ohio Super Lawyers Magazine,* including special recognition as Top 50 Cleveland and Top 100 Ohio

Community & Professional

Fellow, American College of Trust and Estate Counsel

Fellow, American Bar Foundation

Fellow, Cleveland Metropolitan Bar Foundation

Past President, William K. Thomas, American Inns of Court

Past Chair, the C3A (FKA the Consortium Against Adult Abuse)

Trustee, Heights Schools Foundation

Member, Probate Trust and Estate Section Council, Ohio State Bar Association

American Bar Association

THE WORLD OF PROBATE: EVIDENCE, HEARSAY, AND ITS EXCEPTIONS

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1) SPECIAL STATUTORY PROCEEDING AND NON-ADVERSARIAL PROCEEDINGS:

Rule 101(D) [The Rules of Evidence] do not apply to . . . (7) Special statutory proceedings of a non-adversary nature in which these rules would by their nature be clearly inapplicable.

COMMENTARY

RULE 101(C)(7) SPECIAL NON-ADVERSARY STATUTORY PROCEEDINGS. This subsection excludes non-adversary special statutory proceedings from the rules of evidence when the rules by their nature would be clearly inapplicable. The "clearly inapplicable" language is borrowed from Civ.R. 1(C).

A special statutory proceeding is one in which special remedial procedure, rather than general procedure, applies. See R.C. 1.12. The Supreme Court can exclude special procedure from the operation of a rules package.

The subsection has excluded only non-adversary statutory proceedings in which the rules would be, by their nature, clearly inapplicable, e.g., a name change pursuant to R.C. 2717.01. A name change is ex parte. To change a name, the court needs only "proof in open court" to effectuate the name change. The formal rules of evidence are by their nature clearly inapplicable to such a judicial proceeding. Ordinarily, the probate of an estate is non-adversary, and the rules of evidence should not be applicable. But if a dispute should arise during the course of the probate proceedings (for example, a will contest, itself a special statutory proceeding governed by R.C. 2107.71 to 2107.77) the procedure waxes adversary and the rules of evidence should apply.

As for the many "adversary" statutory proceedings there is every reason to apply the rules of evidence. Commitment of the mentally ill is in effect an adversary special statutory proceeding. R.C. 5122.15 provides for the "informal" conduct of the commitment hearing (to deprive a person of his liberty), although the statute does provide for the cross-examination of witnesses. Recently, In re Fisher (1974), 39 OS2d 71, 68 OO2d 43, 313 NE2d 851, required counsel to appear at a commitment proceeding. Should the rules of evidence, although the judge sits without a jury, not apply? To give a blanket exclusion to special statutory proceedings adversary in nature would leave a substantial gap in the

applicability of the rules of evidence. And even to exclude adversary statutory proceedings where "the rules would be by their nature clearly inapplicable" would leave a rather debatable gap in the applicability of the rules.

In Re Guardianship of Marks, 2022-Ohio-2495 (8th Dist).

On appeal of an order finding a ward incompetent and appointing a guardian, several arguments over admissibility of testimony was raised. First, it was argued that the witness did not have personal knowledge of the circumstances of the testimony in violation of Evid. R. 602, and second that a lay witness, pursuant to Evid.R. 701 may only testify to opinions or inferences "which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness' testimony or determination of a fact in issue."

Holding: Guardianships are non-adversarial, and the rules of evidence do not apply to guardianship proceedings.

In re: Guardianship & Conservatorship of Stantin, 2003-Ohio-1106 (10th dist), finding that hearsay rules are "clearly inapplicable" to guardianship proceedings. Hearsay evidence can be considered because the purpose of the guardianship is to gather information in order to determine the best interests of the prospective ward. Applicability of the hearsay rules would interfere with the Probate Court's ability to review all of the facts relevant to the existence or extent of the prospective ward's mental impairment.

Lost or Spoliated Wills

The Standard Test: "When an original will is lost, spoliated, or destroyed subsequent to the death of a testator, or before the death of such testator if the testator's lack of knowledge of such loss, spoliation, or destruction can be proved by clear and convincing testimony, * * * the court may admit such lost, spoliated, or destroyed will to probate, if such court is satisfied the will was executed according to the law in force at the time of its execution and not revoked at the death of the testator." Proof required is clear and convincing evidence. *In re Estate of Haynes,* 25 Ohio St. 3d 101, 103 (quoting 2107.26)

Presumption:

"When a will is left in the custody of a testator and cannot be found after death, a presumption arises that he destroyed the will with an intent to revoke it." "The presumption may be overcome of proof of declarations made by the decedent, proof of circumstances surrounding the condition of the testator or the testator's relations to the persons involved, or by testimony that a third party fraudulently destroyed the will."

In re Estate of Haynes, 25 Ohio St. 3d 101.

Evidence:

The proceeding to admit a lost, spoliated, or destroyed will is a special statutory proceeding in which the hearsay rule is inapplicable. Testimony by witnesses to declarations made by one other than the testator tending either to support or rebut the presumption is admissible on the issue of revocation. The role of the probate court is to review all facts and circumstances surrounding the condition of the testator, the execution of the will and, if the proceeding is to admit a lost, spoliated, or destroyed will, the explanation of the missing, spoliated, or destroyed will so that the court may act from all testimony that may be offered. As stated in Banning v.. Banning (1861), 12 Ohio St. 437, 448: "The establishment and probate of a spoliated will is no idle ceremony, no matter of mere form, no ex parte proceeding; but, on the contrary, it is a proceeding on full notice, affording ample opportunity for contest * * *." We therefore hold that the rejection of the proffered testimony was prejudicial error and requires a rehearing on the issue of revocation.

2) HEARSAY

Is it Hearsay?

In his book, *Trial Notebook*, Professor James W. McElhaney provided a simple mechanism to help one understand whether something is hearsay: "The starting point is cross-examination. The right to cross examination can help identify what is hearsay. There is a question to ask that helps focus the inquiry: Whom do you want to cross-examine to test the reliability of challenged evidence, the witness on the stand or the person who originally said what is being repeated? If you want to cross-examine the witness on the stand – that is, if cross-examination of the witness is adequate to test the reliability of the evidence – then the out-of-court statement is not hearsay. If, however, testing the evidence would require cross-examination of the person who originally made the statement, then it is hearsay." *Trial Notebook*, 3rd Edition, pg. 215-216.

McElhaney provided some examples that help further an understanding of what is and what is not hearsay:

McElhaney's Examples:

1) "I heard a bystander say that the light was red". "If offered to prove the light was red, hearsay. If offered to prove the bystander was awake, not hearsay."
2) "I heard a mechanic tell the pilot the rudder on the airplane was not working right". Offered to prove the rudder was not working right, hearsay". "Offered to prove the pilot was on notice of a defect, not hearsay. "
3) A VERBAL ACT – i.e. words of donative intent:

> "I heard the donor say to the recipient, "John, this money if for you as he handed him a hundred-dollar bill." If used in defense of a debt, it is not hearsay. Not offered for the truth of the statement, but offered it was said. "

Ohio Rule of Evidence 801:

The following definitions apply under this article:

(A) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(B) Declarant. A "declarant" is a person who makes a statement.

(C) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted in the statement.

(D) Statements that are not hearsay. A statement is not hearsay if:

(1) Prior statement by witness.

The declarant testifies at trial or hearing and is subject to examination concerning the statement, and the statement is (a) inconsistent with declarant's testimony, and was given under oath subject to examination by the party against whom the statement is offered and subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (b) consistent with declarant's testimony and is offered to rebut an express or implied charge against declarant of recent fabrication or improper influence or motive, or (c) one of identification of a person soon after perceiving the person, if the circumstances demonstrate the reliability of the prior identification.

(2) Admission by party-opponent.

The statement is offered against a party and is (a) the party's own statement, in either an individual or a representative capacity, or (b) a statement of which the party has manifested an adoption or belief in its truth, or (c) a statement by a person authorized by the party to make a statement concerning the subject, or (d) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (e) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy.

Statements Against Interest:

In contesting the will of Elizabeth Helming, statements made by a now deceased person, George Latin about what Mr. Latin had told them concerning peculiar acts of the testatrix and his opinion of her mental condition. In analyzing the issue, the Court of appeals, 2nd district made note that "the statement must have been adverse to his interests, and most of the authorities hold strictly to the rule that the statement must have been adverse to a pecuniary

or proprietary interest. Further, the court noted that the declaration must have been against the pecuniary interest of the declarant at the time it was made.

"However, it is asserted that Mr. Latin's statements, at the time when made, were against his pecuniary interest, his pecuniary interest being represented by the fact that he was then a beneficiary in the sum of $ 500 by the terms of the 1929 will of Mrs. Helmig. We do not believe that this possibility of receiving $ 500 under the will is the "pecuniary interest" contemplated. The fact that Mrs. Helmig was acting in a peculiar manner, indicating mental instability, and that the statements were made by Mr. Latin, would not invalidate a will made prior thereto and affect a provision therein favorable to Mr. Latin. A will is ambulatory and speaks only from the death of the testator. So long as there is a possibility of destroying or revoking the will, and so long as the testator lives, no rights can vest. It is as reasonable to assert that Mr. Latin in making his statements was acting in his own interest as that he was speaking adversely to his interest, because they tended to establish testatrix's inability to make another will and to that extent increased the possibility that her will of 1929 would become effective. These observations only strengthen the conclusion that Mr. Latin's interest in Mrs. Helmig's will of 1929 was not the "pecuniary or proprietary interest" mentioned in the statement of the exception to the hearsay rule. The pecuniary interest which the declarant must have relates to the subject-matter of his declarations.

At the time that George Latin made the declarations which are offered in testimony in this case, he had no pecuniary or proprietary interest which would bring his statements within an exception to the hearsay rule.

We have discussed the question of the admissibility of the evidence of statements of George Latin at greater length than would of necessity be required. In our judgment the exception to the hearsay rule which we have considered can have no application to testimony relating to testamentary incapacity in a will contest case."

Helmig v. Kramer, (1934) 48 Ohio App. 71, 80-81, 2nd Dist. Ct. App.

3) HEARSAY AND ITS EXCEPTIONS IN PROBATE PROCEEDINGS:

a. Historical view of hearsay evidence in probate proceedings: The since abrogated dead man's statute:

At early common law, an interested party – one with a stake in the outcome of the proceedings – was viewed as inherently untrustworthy and therefore was rendered incompetent to testify:

The theory of disqualification by interest was merely one variety of the general theory which underlay the extensive rules of incompetency at common law. It was reducible in its essence to a syllogism, both premises of which, though they may now seem fallacious enough, were accepted in the 1700's as axioms of trust: total exclusion from the stand is the proper safeguard against a false decision, whenever the persons offered are of a class

specially likely to speak falsely; persons having a pecuniary interest in the event of the cause are specially likely to speak falsely; therefore, such persons should be totally excluded.

Dead Man's statutes constitute part of these more general witness incompetency rules, one designed to close the mouth of an interested survivor, in suits involving transactions with the decedent. *The Terms of the Trust: Extrinsic Evidence of Settlor Intent*, by Franke and Moody, Actec Law Journal volume 40, Spring 2014 at pg. 19, citing John Henry Wigmore, *Evidence in Trials at Common Law* sec. 576 (1981).

b. Ohio Rule of Evidence 601:

One of the purposes of Federal Evidence Rule 601 was to preserve statutes such as the dead man's statute in state matters in those states where such a statute existed. Ohio has chosen to eliminate the exclusion. Rule 601 supersedes R.C. 2317.03, the dead man's statute. By declaring all witnesses to be competent and not providing an exception for the exclusionary provisions of the dead man's statute, a conflict between the rule and the statute is created and the statute is superseded under constitutional provision. Concomitantly, Rule 804(B)(5) provides that the statements formerly excluded by the dead man's statute are exceptions to the hearsay rule. Ohio Evid. R. 601 (staff notes).

c. Ohio Rule of Evidence 804(B):

Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

804(B)(5): Statement by a deceased or incompetent person. The statement was made by a decedent or a mentally incompetent person, where all of the following apply:

(a) the estate or personal representative of the decedent's estate or the guardian or trustee of the incompetent person is a party;

(b) the statement was made before the death or the development of the incompetency;

(c) the statement is offered to rebut testimony by an adverse party on a matter within the knowledge of the decedent or incompetent person.

Drew v. Martino, 2004 Ohio 1071 (9th Dist.):

Based on the record and the proffered testimony, this Court finds that the trial court abused its discretion when it refused to allow Appellant to testify as to what the decedent told him before he expired. Unquestionably, the first two elements of the test set forth in Evid.R. 804(B)(5) has been fulfilled. There is no dispute that Appellant, acting in his capacity as the executor of the Estate of Leland R. Thompson, was a party in the proceedings below and that the statements he attempted to present during his case-in-chief were purportedly made by Mr. Thompson before he died. The only issue contested at trial was whether the evidence presented was used to rebut testimony by an adverse party.

Usually, Evid.R. 804(B)(5) statements cannot be presented during a plaintiff's case-in-chief. However, the statements of the decedent can be offered to rebut an adverse party's

testimony after an adverse party has testified as if on cross-examination. This Court in *Yates* expressed the same rule of law. In *Yates*, the executrix of the decedent's estate sought to introduce the decedent's videotape deposition and other out-of-court statements in her case-in-chief. However, the executrix did not attempt to admit the evidence in rebuttal as required by Evid.R. 804(B)(5); the executrix sought to introduce the evidence before the opposing party presented testimony that was against the decedent's interest. Because the evidence did not comply with the requirements set forth in Evid.R. 804(B)(5), this Court held that the trial court properly excluded the decedent's videotape deposition and other out-of-court statements.

When the trial court relied on *Yates* in its decision to disallow Appellant's testimony, the trial court simply misunderstood our holding in *Yates*, where we stated: "The evidence permitted under [Evid.R. 804(B)(5)] is defensive rather than offensive." The statement was intended to suggest that statements made by a decedent can "be introduced in rebuttal (allowing the decedent to 'speak from the grave') in order to rebut testimony of a party who is permitted to testify under Evid. R. 601." In other words, a representative of the decedent can only act in a "defensive" manner when the party opposing the decedent has made statements contrary to the interests of the decedent during cross-examination or on direct examination as if on cross. Therefore, contrary to the trial court's statement that our holding in Yates was "inconsistent" with *Bobko*, this Court finds that both cases support the same legal principle.

Here, Appellees were called during Appellant's case-in-chief. However, they were called as adverse parties and testified as if on cross-examination. Thus, we find that the testimony presented by Appellant was offered to rebut an adverse parties' testimony after an adverse party has testified as if on cross-examination, thereby satisfying the third element of the Evid.R. 804(B)(5) test.

d. Ohio Rule of Evidence 803(3)

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(3) Then existing, mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Staff Note: This rule indicates the exceptions to the hearsay rule in which the unavailability of the declarant is not an element of the particular exception. In establishing exceptions to the hearsay rule there are two aspects that have predominated common law development. These are necessity and a circumstantial guaranty of trustworthiness surrounding the hearsay declaration that tends to assure truthfulness of the hearsay testimony despite the absence of the oath and cross-examination. Rule 803 sets forth those exceptions to the hearsay rule in which necessity is not a critical factor; that is, the hearsay is admissible notwithstanding the fact that the declarant might be readily available to testify and indeed at

least as to the recorded recollection exception under Rule 803(5) the declarant must himself be on the witness stand. It might, therefore, be more accurate to characterize the exceptions under this rule as those in which "unavailability" of the declarant is not a requisite.

Staff Note to 803(3): This exception is a restatement of traditional common law exceptions pertaining to bodily and emotional condition, and the state of mind exception announced in the classic *Mutual Life Ins. Co. of New York v. Hillmon*, 145 US 285, 36 LEd 706, 12 SCt 909 (1892). Like the common law restrictions, see *Shepard v. U.S.,* 290 US 96, 78 LEd 196, 54 SCt 22 (1933), the exception does not include statements of belief of past events by declarant. To include statements of belief about a past event would negate the entire proscription against hearsay evidence.

In one instance, statements of belief by declarant are rendered admissible under this exception. Where the statement is by a testator concerning the execution, revocation, identification or terms of a will, such statement though constituting a belief about a past event is admissible. The declaration in this specific instance is highly trustworthy since it relates so closely to the testator-declarant's affairs, and the general prohibition against statements of belief about past events is unnecessary.

Commentary: Rule 803(3) appears to permit, however, backward-looking declarations of intent if these declarations relate to the terms of the declarant's will. This is at variance to the Shephard-type prohibition which may well disallow the hearsay exception as to a testator's statements. Backward looking statements related to the declarant's will were carved out based on expediency:

"The carving out, from the exclusion, mentioned in the preceding paragraph, of declarations relating to the execution, revocation, identification, or terms of the declarant's will represents an ad hoc judgment which finds ample reinforcement in the decisions, resting on practical grounds of necessity and expediency rather than logic." Franke and Moody, Supra at pg. 27, citing *Rules of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183, 306 (U.S. 1973) (Advisory Comm. Note to Rule 803).

Commentary: 1 Weissenberger's Ohio Evidence Treatise § 803.35 (2018)

While Rule 803(3) does not generally operate to admit statements of memory or belief to prove the fact remembered or believed, such statements of memory or belief are admissible where they relate to the execution, revocation, identification, or terms of the declarant's will. In this regard, Rule 803(3) is in accord with the prevailing view.

The rationale for this exception to the general inadmissibility of statements of past events is grounded on the special need for such evidence. The testator, the person best in a position to know the facts, and sometimes the only person in possession of such facts, is obviously unavailable at the time his will is in need of interpretation. In almost every dispute over a will, the state of mind of the testator assumes paramount importance, and the testator's own statements are likely to be the most probative evidence of the import of his own will. This need for the testator's statement is often coupled with the recognition, derived from the fact

that a will is a serious matter, that a testator's statements bear peculiar reliability. Consequently, it is reasonably assumed that in the absence of suspicious circumstances, the testator spoke from firsthand knowledge and with due regard for the seriousness and candor required of the occasion.

Under Rule 803(3), statements offered for the purpose of proving that the testator was of sound mind, that he harbored certain emotions or feelings toward those whom he either included or failed to mention, or that he was or was not under the sort of personal pressure amounting to "undue influence" are all admissible. Also admissible are statements indicating his intent to execute, revoke, or modify a will when offered to prove subsequent conforming conduct. The Rule, however, does not permit the introduction of a testator's hearsay statements of believed past facts to prove any facts which do not relate to the execution, revocation, identification, or terms of the declarant's will.

E.g., *Ament v. Reassure Am. Life Ins. Co.*, 180 Ohio App. 3d 440, 2009 Ohio 36 (8th Dist.) (witness's statement was admissible to explain the decedent's motive in designating one sister, and not the other, as a beneficiary in the will). Gockel v. Eble, 98 Ohio App. 3d 281 (8th Dist. 1994) (Rule 803(3) operates to admit out-of-court statements concerning a properly executed will, not a purported will; trial court properly excluded statements by decedent concerning a new will or destruction of the new will by decedent's companion); *Swackhamer v. Forman*, 26 Ohio App. 2d 72 (4th Dist. 1971) (statements by testator that he intended to leave property differently than he did not admitted). See generally 6 Wigmore § 1736; 2 McCormick § 296; Slough, Res Gestae (1954), 2 U. Kan. L. Rev. 246. E.g., *Sutton v. Bethell*, 97 Ohio App. 52(1st Dist. 1953) (statement by testatrix to attorney's secretary indicating the existence of her will admissible to show that failure to change will was not due to lack of knowledge of the will's existence or inadvertence); *In re Woods' Estate*, 105 N.E.2d 589, 61 Ohio Law Abs. 548 (1951) (statements by defendant regarding will admissible); *Chenoweth v. Cary,* 17 Ohio Op. 76, 31 N.E.2d 716, 30 Ohio Law Abs. 98 (1939) (declaration by testator that he has destroyed will is admissible as evidence of his intention), app. dismissed, 136 Ohio St. 123, 17 Ohio Op. 86, 23 N.E.2d 949 (1939). See also *Behrens v. Behrens*, 47 Ohio St. 323, 25 N.E. 209 (1890) (testator's statements after making his will that he destroyed it admissible to show intent); In re *Estate of Karras*, 109 Ohio App. 403, 11 Ohio Op. 2d 334, 166 N.E.2d 781 (1959) (declarations made by defendant about will prior to death admissible).See *Ament v. Reassure Am. Life Ins. Co*., 180 Ohio App. 3d 440, 2009 Ohio 36 (8th Dist.) (witness's statement was admissible to explain the decedent's motive in designating one sister, and not the other, as a beneficiary in the will). See generally Weissenberger's Federal Evidence § 803.17. Cf. Gillespie v. Gray, 49 N.E.2d 108, 38 Ohio Law Abs. 145 (App.) (1942) (in will contest, diaries of testatrix not admissible to prove facts stated therein, but were admissible to prove state of mind or intentions); *McQueeney v. Cahill*, 8 Ohio Law Abs. 495 (App.) (1930) (declaration of testator of intent to disinherit certain relatives admissible to demonstrate intent and motive); *Swin v. Knepper*, 1 Ohio Law Abs. 703 (App.) (1923) (testator's declarations made before and after execution of will admissible to prove state of testator's mind, but not to prove facts supporting undue influence).

1. *Knowlton v. Schultz*, 179 Ohio App.3d 497 (1st dist.):

Evid.R. 803(3) sets forth an exception for the general prohibition against the admission of hearsay for "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will." The hearsay statement must point towards the future rather than the past, unless it relates to the declarant's will.

2. *Young v. Kaufman*, 2020-Ohio-3283, P42-P44

In this appeal, appellants argue that the trial court erred by prohibiting Jim's testimony about the following statements that Joyce purportedly made to him in May 2013: (1) that the 2010 estate plan was a "sin," (2) that "everything was supposed to be equal," and (3) that Joyce had been under "intense" pressure from Josh when she executed the 2010 estate plan.

Appellants further argue that the trial court erred by limiting Doug's testimony. Specifically, appellants contend that the trial court erred by prohibiting Doug from testifying about (1) events that occurred after December 2010, (2) statements Joyce made to him about her 2010 estate plan, (3) whether Joyce's 2010 estate plan was consistent with what Joyce told Doug about her intentions, and (4) whether Doug believed Josh had unduly influenced Joyce with respect to the 2010 estate plan. In their reply brief, appellants acknowledged that Doug testified for the first time at trial. Appellants did not present Doug's testimony at the summary judgment stage of the proceedings.

Finally, the trial court prohibited appellants from introducing Joyce's alleged statements, made during the July 2013 family meeting, that she wanted them to get along, she wanted her estate to be divided equally among the five children, and she wanted the proceeds of her life insurance policy to pay estate taxes.

DISCUSSION

Appellants argue that the aforementioned evidence — Jim's testimony about Joyce's statements in 2013 and Doug's testimony — is admissible under the hearsay exception set forth in Evid.R. 803(3) for "[t]hen existing, mental, emotional, or physical condition."

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). "Pursuant to Evid.R. 802, hearsay is inadmissible unless it falls within an exception provided by the rules of evidence." *State v. Wright*, 8th Dist. Cuyahoga No. 100803, 2014-Ohio-5424, ¶ 32.

Evid.R. 803(3) provides an exception to the hearsay rule for "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition." Evid.R. 803(3) provides that the following is not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact [**30] remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

"The state of mind exception under Evid.R. 803(3) 'does not include statements of belief of past events by declarant. To include statements of belief about a past event would negate the entire proscription against hearsay evidence.'" *State v. Thomas*, 8th Dist. Cuyahoga No. 106194, 2018-Ohio-2841, ¶ 30, quoting 1980 Staff Notes, Evid.R. 803(3).

The testimony sought to be introduced under Evid.R. 803(3) "must point towards the future rather than the past. When the state of mind is relevant it may be proved by contemporaneous declarations of feeling or intent." *State v. Apanovitch*, 33 Ohio St.3d 19, 21-22, 514 N.E.2d 394 (1987), citing *Shepard v. United States*, 290 U.S. 96, 54 S.Ct. 22, 78 L.Ed. 196 (1933).

These precepts of caution are a guide to judgment here. There are times when a state of mind, if relevant, may be proved by contemporaneous declarations of feeling or intent. *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285, 295[, 12 S.Ct. 909, 36 L.Ed. 706 (1892)]; *Shailer v. Bumstead*, 99 Mass. 112 [(1868)]; Wigmore, §§ 1725, 1726, 1730. Thus, in proceedings for the probate of a will, where the issue is undue influence, the declarations of a testator are competent to prove his feelings for his relatives but are incompetent as evidence of his conduct or of theirs. *Throckmorton v. Holt*, 180 U.S. 552, 571[-573, 21 S.Ct. 474, 45 L.Ed. 663 (1901)]; *Waterman v. Whitney*, 11 N.Y. 157 [(1854)]; Matter of Kennedy, 167 N.Y. 163, 172[,] 60 N.E. 442 [(1901)]. Shepard at 104-105.

In support of their argument that the trial court erred by excluding the aforementioned evidence, appellants direct this court to the 2006 Staff Notes to Evid.R. 803(3), which provide, in relevant [**31] part, the [then existing mental, emotional, or physical condition] exception does not include statements of belief of past events by declarant. To include statements of belief about a past event would negate the entire proscription against hearsay evidence.

In one instance, statements of belief by declarant are rendered admissible under this exception. Where the statement is by a testator concerning the execution, revocation, identification or terms of a will, such statement though constituting a belief about a past event is admissible. The declaration in this specific instance is highly trustworthy since it relates so closely to the testator-declarant's affairs, and the general prohibition against statements of belief about past events is unnecessary.

Appellants further direct this court to *Ament v. Reassure Am. Life Ins. Co.*, 180 Ohio App.3d 440, 2009-Ohio-36, 905 N.E.2d 1246 (8th Dist.), for the proposition that Joyce's statements are admissible to determine whether the 2010 estate plan reflects Joyce's wishes or was the result of undue influence.

In *Ament*, the plaintiff-appellant, as trustee of a trust agreement between him and his deceased wife, sued his wife's younger sister, Young Hee Shin Kim ("Young Hee"). Id. at ¶ 1. Appellant alleged that Young Hee and his cousin had caused [**32] the decedent, through undue

influence, fraudulent concealment, and fraudulent inducement, to change the beneficiary designation on a $500,000 life insurance policy from appellant, as trustee, to Young Hee.

Appellant filed a pretrial motion in limine to exclude hearsay statements decedent made to any witnesses who would testify at trial. The trial court denied the motion.

On appeal, appellant argued that the trial court erred in denying his motion in limine and permitting decedent's insurance agent and appellant's cousin to testify regarding what decedent told them. First, appellant objected to appellant's cousin's testimony that decedent told her in or around August 2004, following a meeting with an estate attorney, during which the structure of decedent's estate plan was discussed, that decedent intended to grant the proceeds of one insurance policy to her sister, and the other policies, plus the balance of her estate, to her appellant-husband. This court found that the cousin's testimony was admissible under Evid.R. 803(3) as a statement of decedent's intent in granting the proceeds of one insurance policy to her sister. Ament, 180 Ohio App.3d 440, 2009-Ohio-36, 905 N.E.2d 1246, at ¶ 27.

Second, appellant objected to the admission of decedent's statement in [**33] or around July 2005 to her insurance agent explaining why she designated Young Hee, and not her other sister, as beneficiary of one of the insurance policies. The insurance agent testified that in June 2005, decedent called her and told her that she wanted to change the beneficiary on her life insurance policy. The agency sent the form to decedent on July 1, 2005; decedent completed and returned the form on July 4, 2005. Shortly after decedent completed and returned the form, decedent told the agent that the new beneficiary on the policy was her sister, Young Hee. Decedent told her that Young Hee did not have a husband, house, or money like the other sister. In September 2005, decedent gave Young Hee an envelope that contained the change of beneficiary form. On appeal, this court held that the trial court did not err in admitting this statement because it was admissible under Evid.R. 803(3) to explain decedent's motive in designating Young Hee, and not her other sister, as beneficiary, as it constitutes an exception under Evid.R. 803 to the hearsay rule. Id. at ¶ 29. Decedent's statement was made shortly after decedent completed the change of beneficiary form.

After reviewing the record, we find this case to be distinguishable from Ament. In Ament, the decedent's statements that appellant challenged on appeal constituted decedent's then existing state of mind: her intent in granting the proceeds of a life insurance policy to her sister, and her motive in designating her younger sister as beneficiary. These statements were made at the time decedent granted the life insurance proceeds to her sister in August 2004, and at the time decedent changed the beneficiary of her life insurance policy in July 2005.

In this case, Joyce's statements in 2013 were not made at or around the time Joyce executed her estate plan in December 2010. Nor did appellants attempt to introduce Joyce's 2013 statements to demonstrate Joyce's then existing (i.e., at the time she executed the 2010 estate plan) state of mind — her intent or motive — in excluding appellants as beneficiaries.

In order to use Evid.R. 803(3) to admit hearsay testimony, the statement must refer to a present condition, not a past condition, i.e. "I am afraid of X." *McGrew v. Popham*, 5th Dist. [Licking] No. 05 CA 129, 2007-Ohio-428, ¶ 28, citing *Apanovitch,* 33 Ohio St.3d 19, 514 N.E.2d 394.

Additionally, Evid.R. 803(3) does not permit testimony regarding the declarant's statements as to why he or she held a particular state of mind. *State v. Stewart*, 75 Ohio App.3d 141, 152, 598 N.E.2d 1275 (11th Dist.1991), citing *Apanovitch* [at 21] [**35] . (Emphasis added.) *Brown v. Ralston*, 2016-Ohio-4916, 67 N.E.3d 15, ¶ 42 (7th Dist.).

APPLICATION OF HEARSAY RULES:

Here, to the extent that appellants sought to present Joyce's 2013 statement as evidence that the 2010 estate plan was the result of undue influence, the 2013 statement is not "I am under intense pressure from Josh." Rather, the 2013 statement is Joyce was under intense pressure from Josh when she executed her estate plan in 2010. Therefore, the hearsay testimony refers to a past condition, not a present condition.

Furthermore, Jim's testimony about his May 2013 conversation with Joyce and Joyce's statement that she needed to meet with Steve Gariepy, and Joyce's statement to Gariepy in April 2013 that she wanted to revise her estate plan so that all five children would share equally in her estate is inadmissible because it constitutes a statement as to why Joyce held a particular state of mind (purportedly wanting to revise her estate plan).

Several courts have found a decedent's statements regarding a party's future inheritance to be admissible under Evid.R. 803(3) as reflecting the decedent's then-existing state of mind and intent for the future. See, e.g., [*Knowlton v. Schultz*, 179 Ohio App.3d 497, 2008-Ohio-5984, 902 N.E.2d 548, ¶ 39 (1st Dist.)] (involving a decedent's statement to his daughter that she would receive income from a trust after his death); [**36] McGrew [at] ¶ 30 (involving a decedent's statement regarding her intent that property be transferred to certain individuals upon her death); Brown [at ¶ 48] (involving a decedent's statements regarding his intent to transfer property to his granddaughter upon his death); *Ament*[, 180 Ohio App.3d 440, 2009-Ohio-36, 905 N.E.2d 1246,] at ¶ 29 (involving a decedent's statements of intent to grant proceeds of insurance policies to certain family members).(Emphasis added.) *Pirock v. Cain*, 11th Dist. Trumbull No. 2019-T-0027, 2020-Ohio-869, ¶ 86.

Here, Joyce's 2013 statements are not relevant to the validity of the 2010 estate plan, nor do Joyce's 2013 statements pertain to her then-existing state of mind and intent for future inheritance. Joyce's 2013 statements do not relate to the future, they relate to the past.

For all of these reasons, Joyce's 2013 statements do not fall within the exception to the hearsay rule under Evid.R. 803(3). In challenging Joyce's 2010 estate plan, appellants attempted to present Joyce's 2013 statements regarding her intent to divide her assets equally among the five children and Joyce's feeling that she was under intense pressure from Josh. Appellants sought to introduce these statements as evidence of Joyce's intent, motive, or feeling in the past, at the time she executed the 2010 estate plan. The 2013 statements refer to a past condition, state of mind, or mental feeling and do not reflect Joyce's then existing state of mind in 2010. See *McGrew*, 5th Dist. Licking No. 05 CA 129, 2007-Ohio-428, at ¶ 30. Accordingly, Joyce's 2013 statements were not admissible under Evid.R. 803(3).

Young v. Kaufman, 2020-Ohio-3283, P42-P44

ACCESS TO MENTAL HEALTH AND ADDICTION SERVICES

Katie Cretella
Trumbull County Mental Health & Recovery

KATIE CRETELLA

EDUCATION:

Youngstown State University:
Master of Business Administration with a Specialization in Healthcare, 2021
Master of Science in Education with a concentration in Clinical Mental Health, 2017

EMPLOYMENT:

Katie is responsible for monitoring mental health programs and services delivered by provider agencies and overseeing legal and probate functions of the Board.

Coleman Health Services – Director of Crisis Services, 2017-2021

PROFESSIONAL EXPERIENCE:

Katie has experience servicing marginalized populations in the community, hospital, juvenile detention, jail, and K-12 education system. She is the Director of Clinical Services at the Trumbull County Mental Health and Recovery Board where she monitors mental health programs and services delivered by provider agencies and oversees legal and probate functions of the Board.

CERTIFICATIONS:

Licensed Professional Clinical Counselor

PROFESSIONAL AFFILIATIONS:

Chair of the Trumbull County Suicide Prevention Coalition
Co-Chair of the Crisis Intervention Team Training for Law Enforcement

Mental Health Services (MH)

A mental illness is a condition that affects a person's thinking, feeling, behavior or mood. These conditions may impact daily living and affect the ability to relate to others. If you or someone you know has a mental illness, you are not alone. For help, contact one of the agencies with MH by its name.

Substance Misuse Services (SM)

Substance misuse and addiction inhibit a person's ability to control the urge to use substances like drugs and alcohol despite negative consequences. Recovery is difficult but possible with the appropriate support, tools, and services. For help, contact one of the agencies with SM by its name.

The Trumbull County Mental Health and Recovery Board contracts with the following agencies to ensure there is a safety net of services available for all residents.

The Trumbull County Mental Health and Recovery Board receives funding from the Ohio Department of Mental Health and Addiction Services, federal programs, grants and local levy dollars. Trumbull County residents will not be turned away due to a lack of insurance or ability to pay at these agencies.

Our 24/7 crisis line is managed by

Help Network of NE Ohio

211

If you or someone you know is suicidal, experiencing a mental health or addiction crisis or looking for information, call 330-747-2696 or dial 211, 365 days a year. The online database is available at **www.helpnetworkneo.org.**

Alta Behavioral Healthcare – MH
(Specializes in children and families)
1950 Niles-Cortland Rd. NE, Warren, OH
330-736-0073

Cadence Care Network - MH
(Specializes in children and families)
165 E. Park Ave, Niles, OH
330-544-8005

Coleman Health Services - MH
103 W. Market St, Warren, OH
Crisis Access Center: 330-392-1100
Mental Health Services: 330-394-8831

Compass Family & Community Services –MH/SM
320 High Street NE, Warren, OH
330-394-9090

First Step Recovery of Warren – SM
2737 Youngstown Warren Rd. SE, Warren, OH
330-369-8022

Flying High - SM
Workforce Development
237 South Main St, Warren OH
330-797-3995

Glenbeigh Niles – SM
29 North Rd, Niles, OH
330-652-6770

Meridian HealthCare - SM
320 High St NE, Warren, OH
330-318-3871
1950 Niles Cortland Rd, Warren, OH
330-318-3911

NAMI Mahoning Valley - MH
Support groups, education classes and advocacy
201 Wick Ave, Youngstown, OH
330-727-9268

New Day Recovery, LLC - SM
1500 McKinley Ave, Niles, OH
330-953-3300

Parkman Recovery Center for Men - SM
4930 Enterprise Drive, Warren, OH
330-787-0955

Salvation Army Drop-In Center – MH
270 Franklin St., Warren, OH
330-392-1573

Thrive Counseling Center- MH/SM
1705 Woodland St NE, Warren, OH
330-469-6777

Travco Behavioral Health – MH/SM
2671 Youngstown Rd SE, Warren, OH
330-822-6545

Urban League/Christy House
Homeless Shelter
919 Main Ave, Warren, OH
330-394-3670

Valley Counseling Services - MH
150 E. Market St #100, Warren, OH
330-399-6451
318 Mahoning Ave NW, Warren, OH
330-395-9563
(Specializes in children and families)
4970 Belmont Ave, Youngstown, OH
330-759-8237

ASAP
Alliance for Substance Abuse Prevention

The Alliance for Substance Abuse Prevention

(ASAP), a project of the Trumbull County Mental Health and Recovery Board, is a coalition of community partners working to reduce substance abuse and addiction in our community. Call 330-675-2765 ext. 119 for more information. Like us on Facebook – ASAP – Alliance for Substance Abuse Prevention.

LAWYER ADVERTISING & SOLICITATION:

Just Do It or Just Say No?

Kimberly Vanover Riley, Esq.
Montgomery Jonson LLP

Kimberly Vanover Riley

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

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

Ms. Riley is a certified instructor in Human Resources for the National Center for State Courts' Institute for Court Management and is an Ohio State Bar Certified Specialist in Labor and Employment Law. She has also been selected as one of Ohio's Super Lawyers/Super Lawyer Rising Stars on multiple occasions, and she has a 10.0 Avvo rating. She 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, soon in its fourth 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 Directors Association, the Ohio Urban Courts Conference, the Miller Becker/Ohio State Bar Association annual statewide ethics seminar; 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, the Arkansas Administrative Office of Courts, the Arkansas Judicial Conference, the New Mexico Administrative Office of Courts, 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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LAWYER ADVERTISING & SOLICITATION:

JUST DO IT OR *JUST SAY NO?*

42ND ANNUAL PROBATE PRACTICE SEMINAR
OCTOBER 6, 2023

KIM RILEY, ESQ.
CINCINNATI | CLEVELAND
KRILEY@MOJOLAW.COM
(513)241-4722 | (216) 221-4722

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ATTORNEY ADVERTISING THROUGHOUT HISTORY

- Law practices were largely unregulated until late 1800s.
- Restrictions on legal advertising followed shortly thereafter—almost entirely banned throughout 1900s.
- 1970s: US SCT issued several rulings finding First Amendment permitted legal advertising.
- 1970-today: Various tweaks through the professional conduct system
  - Some states: Regulated by State Bar
  - Other states (including Ohio): regulated by State Supreme Court
- And today…

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HUTSON & HARRIS

- Nobody Knows (If It's Pot or if it's Hemp)
- What Part of "Any" Don't You Understand?
  - (Admitting to driving after using *any* impairing substance=DWI)
- Pot Brownies
- Please Shut Up!
- Holiday Medley: O Christmas Weed; Pack the Bowl (with lots of Kush); Have Yourself an Unindicted Christmas

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BRYAN WILSON, THE TEXAS LAW HAWK

- One in a series of commercials. Others include sweaty, unethical police officers; women in bikinis; and advice to refuse breathalyzers.
- All his commercials have been vetted by the Texas State Bar Advertising Review Panel
- These were both from TEXAS—we'll talk OHIO today.

Montgomery Jonson

OHIO ATTORNEY ADVERTISING, 101

- Regulated by Ohio Supreme Court through Rules of Professional Conduct
- Violations investigated/prosecuted by ODC/CGC, and heard before Board of Professional Conduct. May be initiated via:
  - Signed grievance
  - Anonymous grievance / phone call (competitors)
  - *Anything that comes to their attention*

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ADVERTISING VS. SOLICITATION

- Some of the rules address conduct occurring in advertising (broadcast to a wide audience, not targeted)
- Others address conduct occurring in solicitation (more narrowly targeted to an individual or group of individuals)
- Others still address what you may or may not say about yourself in any environment.

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How am I permitted to describe myself and my practice?

RPC 7.1, 8.4(e)

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RPC 7.1 – COMMUNICATIONS CONCERNING YOUR SERVICES

- Can't make the following kinds of statements about yourself or your services:
  - False
  - Truthful, but Misleading
  - Nonverifiable
  - Containing material misrepresentation of fact or law
  - Omitting fact(s) that make the statement as a whole materially misleading

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EXAMPLES OF 7.1 VIOLATIONS

- Advertisements that truthfully report achievements if they lead a reasonable person to unjustifiably expect the same results (may be cured with disclaimers/qualifiers) (RPC 7.1, [3])
- Unsubstantiated comparison of lawyer's services or fees in a way that suggests they can be substantiated (may be cured with disclaimers/qualifiers) (RPC 7.1, [3])
- Using words to describe your fees like, "cut rate," "lowest," "below cost," "discount," or "special" (RPC 7.1, [4])
- *Cincinnati Bar Ass'n v. Mezher,* 2012-Ohio-5527, an attorney advertised a "free consultation," but when clients signed a fee agreement within that consultation, fees immediately began to accrue.

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IS THIS DIFFERENT FROM THE OLD RULE?

- RPC 7.1 was previously 2-101

- 2-101 prohibited client testimonials or self-laudatory claims; 7.1 does not.
  - But ensure client testimonials/self-laudatory claims don't otherwise violate the rules (e.g., false, misleading, nonverifiable, etc.)

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A WORD ON CLIENT TESTIMONIALS: BPC 2016-8

- Lawyers may include client testimonials in advertising IF it isn't false/misleading/unverifiable. Testimonials referring to favorable outcomes ("after my DUI, I was able to keep my license") must contain clear and conspicuous disclaimers to avoid unjustified expectations (e.g., "prior results do not guarantee a similar outcome in your case").
  - Cannot provide anything of value to a client for recommending you.
  - If using actor instead of client, must divulge this to avoid misleading representation.

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CLIENT TESTIMONIALS, *CONT.*

- Client testimonials about settlement or verdict amounts = inherently and incurably misleading. Don't include them.

- Lawyers are responsible for monitoring testimonials and reviews their clients place on websites where the lawyer controls the content. They are responsible to remove misleading content, even if created by the client.
  - Lawyers don't lose any obligations to maintain client privacy/confidentiality in responding to a negative review.

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DUAL PROFESSIONS

- Proceed with caution when advertising or holding yourself out as practicing law & providing any secondary service (e.g., investment advisory services)
  - Permissible, but must be careful to avoid false, misleading, unverifiable
  - May relay other earned academic degrees/professional licenses on practice letterhead, office signage, and professional cards—*but* cannot imply specialist in particular field of law
  - Ensure compliance with state/federal regs, in addition to RPC 7.1-7.5
  - BPC Advisory Op. 2020-08 & 2018-06

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MORE ON MONITORING YOUR ONLINE PRESENCE…

- Review client testimonials on websites to ensure they didn't use prohibited language (e.g., "he's the best lawyer"). If you have control over content, remove anything impermissible under 7.1, 7.2. (SuperLawyer® recognition is permissible.)
- Abstain from reciprocal endorsements or recommendations, or sending a gift/compensation to someone for recommending you (online or in person)
- If you use any social media professionally, include your office address on the site, or, if not possible, a link to your website. Scrutinize bio/profile for accuracy.

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EXPERTISE—RPC 7.4

- 7.4(a)-(e):
  - Rule: Can only say you practice / concentrate in a particular field, but cannot state or imply you are a specialist/expert in a particular field.
  - Exceptions:
    - Patent Attorneys, Trademark Attorneys, and Proctors in Admiralty have limited exceptions.
    - Certified Specialists: If certified as a specialist by an organization that has been approved by the Supreme Court Commission on Certification of Attorneys as Specialists, you may clearly identify the name of the certifying organization.
      - But see 2021-05: RPC 7.4(e) prohibits promoting a specialty certification by an accredited organization that is still not formally designated as a specialty by the Ohio Supreme Court (e.g., National Board of Trial Advicacy's certification in truck accident law).

BRANDING—RPC 7.5

- 7.5: Law firm names must be accurate, not misleading, and no trade names.
  - Solo can't say "Solo *and Associates*" (*CMBA v. Lemieux,* 2014-Ohio-2127; *CMBA v. Westfall,* 2012-Ohio-5365)
  - Name must contain your legal name—and not someone else's name
  - If someone isn't practicing due to public office or otherwise, must note this.
  - May not indicate partnership (Smith & Jones) or other organization if not true.

BRANDING, *CONT.*

- No trade names ("PI Lawyers, Inc.")
  - But OK for website/domain name (www.PILawyers.com) – BPC 2018-05
  - But can't convey/imply a specialty when not certified or include anything else that is misleading (e.g., "PISpecialists.com") – BPC 2018-05
- BPC 2020-12: Service Mark OK to convey limitation/concentration in certain field(s) but only in conjunction with firm's name and within limits of other rules, like not false, misleading
  - Guardian Law, LLC = acceptable Trade Name;
  - Protecting the Unprotected = acceptable Service Mark, but not in *lieu* of formal firm name, too.
- If someone in your office isn't licensed in Ohio, must specify.

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SHERIFF V. GILLIE, US SCT (MAY 2016)

- State of Ohio hires contract attorneys as "special counsel" to collect debts of the state (e.g., student loans, hospital bills)
- They use OAG letterhead to collect; debtors complained of FDCPA violations, misleading and abusive.
- Unanimous Court held this was not misleading because authorized by the state.
- That said, exercise caution in applying this decision to allowing people not affiliated with your firm to sign correspondence on behalf of your firm.

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CONSIDERATIONS IN BUYING BLOG CONTENT

- Some services offer blog content you can place on your website and pass it off as your own. Concerns with that?
  - RPC 7.1: Can't advertise with false or misleading information, even if falsity is one of omission (i.e., just because your name isn't on it doesn't mean people won't assume you wrote it)
  - RPC 8.4(c): Can't engage in dishonesty, fraud, deceit, or misrepresentation.

RPC 8.4(E)

- Prohibits stating or implying:
  - ability to improperly influence a government agency or official
  - Can achieve results by means that violate RPC or the law

How am I permitted to contact people?

RPC 7.2(a), 7.3(a)

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RPC 7.2(A)/7.3(A)—ADVERTISING AND SOLICITATION: THE MEDIUM (AND AMENABILITY) MATTERS.

- **Acceptable***
  - Written, recorded, or electronic media
  - Internet ads
  - Website
  - Blog
  - Social Media
  - Online directory listings
  - Television
  - Radio
  - Print Media
  - Text Message**

With Conditions/Limitations in the Prof. Conduct Rules about content and method. Also subject to state/federal telemarketing, spam laws

****More caveats than the rest***

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RPC 7.2(A)/7.3(A)—ADVERTISING AND SOLICITATION: THE MEDIUM (AND AMENABILITY) MATTERS.

- **Unacceptable**
  - Solicitation in person, face-to-face, over live telephone, or via real-time electronic means (e.g., chat room, voice texting apps, Skype, Twitter(?))
    - *Exception: other lawyers, family, close personal friends, former clients/professional relations*
    - *Exception: BPC 2023-2 says nonprofit legal aid lawyers may engage in direct face-to-face solicitation if receiving no fee/remuneration.*
  - Contact with anyone (whether ordinarily acceptable or one of the above exceptions), if:
    - They have made known their lack of desire to be solicited
    - It involves coercion, duress, or harassment
    - The lawyer know or should know it is being addressed to a minor, an incompetent person, or someone whose physical/emotional/mental state makes it unlikely they could exercise reasonable judgment in employing counsel.

A WORD ABOUT FACE-TO-FACE: BPC 2012-2

- Attorneys may not meet contemporaneously with prospective clients who attend a legal seminar where the lawyer presented. The attorney cannot schedule time to answer legal questions, even if the attendees signed up to do so in advance.
- A "prior professional relationship" exception does not apply to prospective clients who are employees of an existing organizational client of the presenting lawyer
- An exception exists for lawyers providing pro bono legal services.
- If attorneys offer educational seminars, their advertisements, brochures, and law firm information may only be available near the exit of the seminar where the lawyer has presented.

ADDED PRECAUTIONS ABOUT SOCIAL MEDIA

- No unique rules, but practical challenges make it worth remembering things you already know:
  - Screen your statements for accuracy and that they are not misleading, even if accurate
  - Don't render legal advice—could run into conflicts, inadequate information, UPL
  - Don't impugn integrity of judicial officers, opposing counsel
  - Don't violate client confidences / get into discussions about clients online
  - Think long and hard before responding to former client's bad review of your work—consider instead disabling comments to your wall, etc.
  - Don't send or accept a friend request that would connect you to an opposing party
- RPC 1.1, [8]: Duty of competence includes keeping on top of changing technology.

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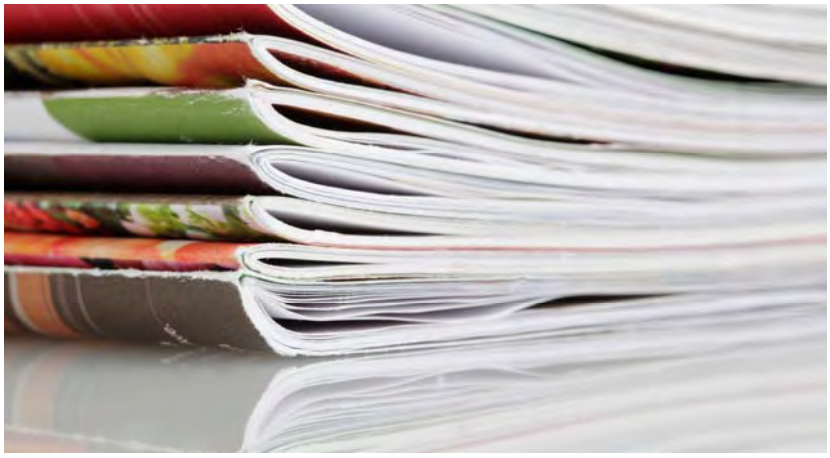
How am I permitted to find work through advertisements and referrals?



RPC 7.2(b)-(d)

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RPC 7.2(B)—ADVERTISING AND RECOMMENDATION OF PROFESSIONAL EMPLOYMENT; NO PAID REFERRALS

- Can't give anything of value to another for recommending your services.
  - No paid endorsements, nor in-kind endorsements (referral-trading)
  - Can pay the reasonable cost of advertisements/communications that are otherwise permissible
  - Can pay the usual price of a legal service plan
  - Can pay the usual price for a nonprofit or lawyer referral service that otherwise complies with Gov. Bar XVI.
  - Can pay for a law practice (see RPC 1.17)

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RPC 7.2, [5]-[7]—ADVERTISING AND RECOMMENDATION OF PROFESSIONAL EMPLOYMENT; MORE ON PAID REFERRALS

- Can't give anything of value to another to recommend you / channel work your way
- "Recommendation"—broadly construed ; vouching for you in any professional way
- ***Prohibits reciprocal referral agreements between you & a lawyer/nonlawyer***
- Can pay publicists, PR personnel, business development staff, and website designers (but ensure they follow all the same rules as you)
- Can pay a person or service to generate leads, but must follow rules on:
  - Fee sharing and expenses (1.5)
  - Maintaining professional independence (5.4)
  - Must require lead generator to avoid stating, implying, or creating impression that s/he is recommending you, making referral without payment, or has analyzed the lead's case in referring them (5.3, 7.1, 8.4(a)).
- Legal service plan (prepaid/group service)/nonprofit/lawyer referral service okay, if set up according to rule requirements. Can't accept assignments you're unqualified to handle.

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RPC 7.2—ADVERTISING AND RECOMMENDATION OF PROFESSIONAL EMPLOYMENT

- Subpart (c): Any communication/advertisement must include the name and office address of at least one lawyer or law firm responsible for its content.

- Subpart (d): Can't seek employment in a matter in which the lawyer/firm doesn't intend to actively participate in the representation—only intends to refer. (N/A to lawyer referral/legal service plans themselves, but does apply to its lawyer participants.)

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RPC 7.2, [2]—ADVERTISING AND RECOMMENDATION OF PROFESSIONAL EMPLOYMENT

SUBJECT TO OTHER RESTRICTIONS IN THE RULES, IT'S OKAY TO DISSEMINATE:

- Contact Info: Firm name, address, email, website, phone number
  - *Be aware of limitations on website/firm names*
- Kinds of services you will undertake
  - *Be aware of limitations on identifying as "expert" or "specialist"*
- Basis on which your fees are determined, and prices for specific services
  - *Avoiding the "bargain words" prohibitions in RPC 7.1*
- Payment/credit arrangements
- Foreign language ability
- Names of references
- Regular clients (only if they have consented to be listed)
- Other info that might invite the attention of those seeking assistance

Montgomery Jonson

NO LONGER HAVE TO INCLUDE:

- Under the pre-1999 rules, lawyers were prohibited from advancing/guaranteeing financial assistance except for litigation expenses, but the old rule said "the client remains ultimately liable for such expenses." Therefore, DR-2-101(E)(1)(c) required disclosing whether contingency fees were computed before or after deduction; and advertising had to make clear that litigant could be compelled to repay these. (See BOCGD 98-9).
- DR-5-103(B) was amended in 1999 to remove mandatory client liability for costs and expenses, and switched it to a permissive *may*.
- 2007 amendments to Rule 1.8(e) now specifically permit attorneys to advance costs/litigation expenses without requiring repayment.
- These were the bases for previous prohibitions on advertisement statements like, "we don't get paid unless you get paid." However, today—*if those statements are true (i.e., not subject to contractual obligations to be paid)*—they may be appropriately included in advertisements.

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BPC 2017-1: ADVERTISEMENT OF CONTINGENT FEE ARRANGEMENTS

- A lawyer who advertises litigation services on a contingency may not say "There is no charge unless we win your case" or "No fee without recovery," if intending to recover advanced litigation costs and expenses from the client, regardless of the outcome of the litigation.
- If a lawyer intends to recover advanced costs and expenses, advertisement must contain a disclaimer that explains the client's obligations for repayment.

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Professionalism in Attorney Advertising

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WHAT DO THE RULES SAY?

- Preamble, [5]: Lawyers play a vital role in the preservation of society. A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs…A lawyer should demonstrate respect for the legal system and for those who serve it…
- Preamble, [6]: A lawyer should further the public's understanding of and confidence in the rule of law and the justice system…
- Rule 8.4: It is professional misconduct for a lawyer to do any of the following:
  - (d) engage in conduct that is prejudicial to the administration of justice.
  - (g) engage in a professional capacity in conduct involving discrimination prohibited by law because of race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability.
  - (h) engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.

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WHAT DOES THE SUPREME COURT'S *PROFESSIONAL IDEALS FOR OHIO LAWYERS AND JUDGES* SAY?

- I shall aspire…to conduct myself always with an awareness that my actions and demeanor reflect upon our profession.
- I shall aspire to consider the effect of my conduct on the image of our system of justice, including the effect of advertising methods.

RPC 7.2—ADVERTISING AND RECOMMENDATION OF PROFESSIONAL EMPLOYMENT

- Comment [3]—i.e., the "Anti-Texas-Law-Hawk" provision
  - Questions of effectiveness and taste are subjective. Some jurisdictions have excessive prohibitions against using TV and other mediums; or limit attorneys from saying anything beyond a list of specific facts about themselves; or "undignified" advertising.
  - We're not going to prohibit TV, Internet, or other forms of electronic communication like other jurisdictions because we think they are effective at reaching the public, especially those with low and moderate income.
  - We're also not going to say you have to limit your advertising to name, rank, and serial number—including other information might be helpful. (Old 2-101(D) did.)
  - [Conspicuous Silence as to "undignified" advertising]
- Comment [4]—Neither 7.2 nor 7.3 prohibit communications authorized by law, such as class action litigation notices.

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- Another real ad from 2014 by attorney admitted in 2013
- Quoted in local legal blog (Pittsburgh Legal Back Talk) as saying he sees "nothing unethical in the ad, but he will take it down if asked by law enforcement or the bar. Apparently, nobody has."
- Quoted in another national legal blog (Ethics Alarms) as within the conduct permitted by the PA Rules of Professional Conduct:
  - Not misleading
  - Doesn't make promises it can't keep
  - Doesn't represent dramatic recreations as fact, or use broad metaphors and exaggerations
  - Bans on undignified advertising or those that undermine trust in the profession have now been disregarded as vague and breaching free speech principles.
- Epilogue: Attorney stopped practicing in 2017; now on administrative suspension while serving 5-year federal sentence—DA heavily quoted his advertisement within his sentencing memorandum

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How am I permitted to find work through direct, situation-specific solicitation?

RPC 7.3

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SOLICITATION REQUIREMENTS—WHAT THE SOLICITATION MUST CONTAIN (7.3(C))

- Every written, recorded, or electronic communication to solicit employment from someone *you reasonably believe needs services in a particular manner*:
  - Must accurately/fully disclose how you knew recipient's identity/ specific legal need.
  - Must disclaim/refrain from expressing predetermined evaluation of the merits
  - Must conspicuously include "ADVERTISING MATERIAL" or "ADVERTISEMENT ONLY"
    - Written: Must be included in the text of the message
    - Mailed: Must also be included on the outside of the envelope, if any
    - Recorded: Must be included at the beginning AND ending
    - Electronic: Must be included at the beginning AND ending
- Not applicable to written, recorded, or electronic communication to other lawyers, family, close personal friends, former clients/professional relations

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SOLICITATION REQUIREMENTS—SPECIAL REQUIREMENTS FOR CIVIL DEFENDANTS (7.3(D))

- Before making a Solicitation under 7.3(c) to a defendant in a civil action (not including a debtor in a potential/actual bankruptcy action), must first verify service. RPC 7.3(d)
  - Must do so via reviewing the docket for mail, personal, or residential service, or whether service by publication has been completed.
  - No exception to this requirement for nonprofit legal aid lawyers receiving no compensation for this effort. RPC 2023-02.

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SOLICITATION REQUIREMENTS—SPECIAL REQUIREMENTS FOR PI/TORT CLAIMS SHORTLY AFTER EVENT (7.3(E))

- If soliciting work in a PI/wrongful death within 30 days of the accident or disaster, communication must:
  - 7.3(a)/(b) (avoid prohibited manner of contacts, and prohibited people/circumstances to contact)
  - 7.3(c) (limitations on solicitation's contents)
  - 7.3(d) (civil defendants), **AND**
  - 7.3(e) ("Understanding Your Rights" Disclosure)

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"UNDERSTANDING YOUR RIGHTS" (COPY AND PASTE FULL TEXT FROM 7.3(E)—NOT THESE BULLETS)

1. Make and keep useful records (e.g., police reports, names of witnesses, photos, receipts)
2. You don't have to sign anything / effects if you make statements to others
3. A conflict exists between you and the interests of other parties, including insurance companies
4. There are time limits for insurance claims and lawsuits
5. Benefits of getting offers of settlement or other promises in writing
6. Possible need for legal assistance
7. You can find an attorney through lawyer referral programs and other resources
8. Check a lawyer's qualifications
9. Overview of how attorneys get paid and questions to ask about fees and costs.

Also: must state that Ohio Supreme Court neither promotes nor prohibits lawyer solicitation.

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FORMER CLIENTS: 2023-07

- With rare exception, a discharged lawyer may not solicit a former client to continue a client-lawyer relationship after the client has retained a new lawyer in the matter.
- Board does not condone a blanket prohibition against a discharged lawyer having any contact with a former client, but the permissible exceptions are narrow. Examples:
  - To inquire about an outstanding payment, a refund of fees or expenses, or return of client property not resolved contemporaneously at termination.
  - In rare circumstances, a former client may wish to consult with the previous lawyer about the advice or counsel he or she received from the new lawyer. RPC 4.2, [3] (rule does not preclude communication with a represented person who is seeking advice from a lawyer who is Op. 2023-07 4 not otherwise representing a client in the matter.)
- The purpose of the rule is to prevent lawyers from overreaching, interfering in other client-lawyer relationships, and eliciting protected client information. RPC 4.2, [1].

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A WORD ABOUT TEXT MESSAGING: BPC 2013-2

- Direct contact with prospective clients via text messages is potentially permissible because it has been deemed to be an electronic communication that is not in real time.
- However, the additional requirements to this permission are so unwieldy as to make it largely impracticable:
  - Must continue following all ethics rules on solicitation.
  - The "Understanding Your Rights" disclosure must be spelled out in its entirety in the body of the text—no link, no attachment, no photographic substitute.
  - Must ensure the message(s) are sent at no cost to the prospective client—not every cellular plan will include free or unlimited text messaging; even if free, users travelling internationally may incur costs. If you cannot verify that the text will send for free, you must employ "Free to End User" or similar technology before sending.
  - Must be mindful of the age of the recipient before sending—abstain from texts to minors.
  - May not violate state or federal telemarketing laws (e.g., Telephone Consumer Protection Act, CAN-SPAM, R.C. 109.87, 2307.64, etc.)

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2017-03: SOLICITATION OF PROFESSIONAL EMPLOYMENT VIA EMAIL

- Lawyers may use email to solicit professional employment, subject to the restrictions in the Professional Conduct Rules about all lawyer communications and solicitations.
- Lawyers may allow a lawyer referral service or a lawyer advertising service to transmit a solicitation email on the lawyer's behalf—*but* they remain on the hook for the content of the email and must ensure it's compliant.

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BPC 2020-06: LAWYERS DEPARTING LAW FIRMS

- A law firm and departing lawyer have ethical obligations to ensure affected clients are informed of the lawyer's departure.
- They may jointly or separately notify affected clients.
- The notice may indicate the availability and willingness of the lawyer or law firm to continue to provide legal services to the client.
- The lawyer & firm must accept the client's choice of counsel prompted by the lawyer's departure.
- A law firm cannot prevent a departing lawyer from notifying affected clients for whom he or she has principal responsibility.

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BPC 2023-08: DEPARTING LAWYER REIMBURSING FIRM FOR ADVERTISING COSTS

- Professional Conduct Rules prohibit law firms from adding clause to employment contracts to require departing lawyers to pay back the *quantum meruit* value of work completed prior to the lawyer's departure, plus 25 percent of the overall recovery of attorney fees on any transferred cases to reimburse the firm for its advertising costs.
- Deemed an impermissible restriction on the departing lawyer's right to practice after termination of the employment relationship.
- Also an impermissible division of attorney fees by lawyers not in the same firm.

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What about more general, less targeted solicitations?

RPC 7.3(f)

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PREPAID OR GROUP LEGAL SERVICE PLANS – RPC 7.3(F)

- May join such a plan, operated by third party, that uses in-person or telephone contact to solicit memberships or subscriptions for the plan.
- Prospective clients solicited for the plan cannot be known to need legal services in a particular matter that is covered by the plan.

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A WORD ABOUT LAWYER PARTICIPATION IN REFERRAL SERVICES: 2016-3

- A lawyer should carefully evaluate a lawyer referral service, or similar online model, to ensure that it complies with the RPC, Gov Bar XVI, and the ethical requirements of the lawyer.
- A lawyer's participation in an online, nonlawyer-owned legal referral service, where the lawyer is required to pay a "marketing fee" to a nonlawyer for each service completed for a client, is unethical.
- A lawyer must ensure that the lawyer referral service does not interfere with the lawyer's independent professional judgment under RPC 5.4.
- A lawyer is responsible for the conduct of the nonlawyers of the service (RPC 5.3), as well as the advertising and marketing provided by the service on the lawyer's behalf (RPC 7.1-7.3)
- A fee structure that is tied specifically to individual client representations that a lawyer completes or to the percentage of a fee is not permissible, unless the lawyer referral service is registered with the Supreme Court of Ohio. (RPC 1.5; Gov.Bar R. XVI)

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WHERE TO GO FOR MORE INFORMATION?

- https://ohioadvop.org/advisory-opinion-index/#A → "Advertising and Solicitation"
- There are way too many specifics to address in one CLE.
- The Board has issued advisory opinions that are identified 117 times under 39 advertising and solicitation topics: Consult them in nailing down your planned advertising.
- Note the date of the opinion to determine if they are relying on older versions of the Rules; even if so, compare the opinion to the Rules for whether any portion of the old opinion still applies. (Consult the Advisory Opinions Status List: https://ohioadvop.org/advisory-opinion-status)
- Consider running planned website content, advertisement, solicitation letters past private counsel, the Office of Disciplinary Counsel, Bar Counsel, and/or the Board of Professional Conduct.

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LAWYER ADVERTISING & SOLICITATION:

JUST DO IT OR *JUST SAY NO?*

42ND ANNUAL PROBATE PRACTICE SEMINAR
OCTOBER 6, 2023

KIM RILEY, ESQ.
CINCINNATI | CLEVELAND
KRILEY@MOJOLAW.COM
(513)241-4722 | (216) 221-4722

Montgomery Jonson

CURRENT TOPICS IN PROBATE

PANEL DISCUSSION

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

Hon. Thomas M. Baronzzi
Judge, Columbiana County Probate Court

Hon. Jack R. Puffenberger
Judge, Lucas 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 THOMAS BARONZZI

Judge Thomas M. Baronzzi has served as Judge of the Columbiana County, Ohio Juvenile and Probate Courts since January 16, 2001. Prior to serving on the bench, he maintained a general litigation practice for 14 years in Lisbon, Ohio. Judge Baronzzi is a 1984 graduate of Kent State University with a Bachelor's Degree in Business Administration and Economics. He received his Juris Doctorate degree from the University of Akron School of Law in 1987. In addition to his private law practice, he has served as a CASA, Special Prosecutor, Public Defender, Arbitrator of civil litigation and CLE seminar presenter. He served as President of the Columbiana County Law Library Association for 20 years and is a member of the Ohio Supreme Court Probate Forms Committee. He has served as general counsel or on the board of many civic, charitable or religious organizations. He is 59 years old, has been married for 34 years and has 3 grown children and 1grandson.

Judge Jack Puffenberger

Judge Jack R. Puffenberger has been the Presiding and Administrative Judge of the Lucas County Common Pleas Court, Probate Division, since 1991. Prior to this, he was twice elected as a Judge of the Toledo Municipal Court. He is currently a member of the Ohio Supreme Court Commission on the Rules of Practice and Procedure and the Ohio Judicial Conference Executive Committee where he co-chairs that organization's Probate Law and Procedure Committee. Judge Puffenberger is also a member of the Executive Committee and a Past President of the Ohio Probate Judges Association, as well as currently serving on the Judicial Advisory Committee.

Judge Puffenberger is a former Trustee of the National College of Probate Judges and a former member of the Board of Governors of the American Judges Association. He has served on the Ohio Supreme Court Board of Commissioners on Grievances and Discipline and the Ohio Supreme Court Advisory Committee on Technology and the Courts and is currently a member of the Executive Committee of the Lucas County Bar Association. He is also active in numerous professional and community organizations.

Judge Puffenberger received his B.A. from Kent State University, M.S. from Youngstown State University and J.D. from the University of Toledo College of Law.

Direct Service Providers and Guardians

Sup. Rule 66.04 (D) states that:

> *"The probate division of a court of common pleas shall not issue letters of guardianship to any direct service provider to serve as a guardian for a ward for whom the provider provides direct services, unless otherwise authorized by law."*

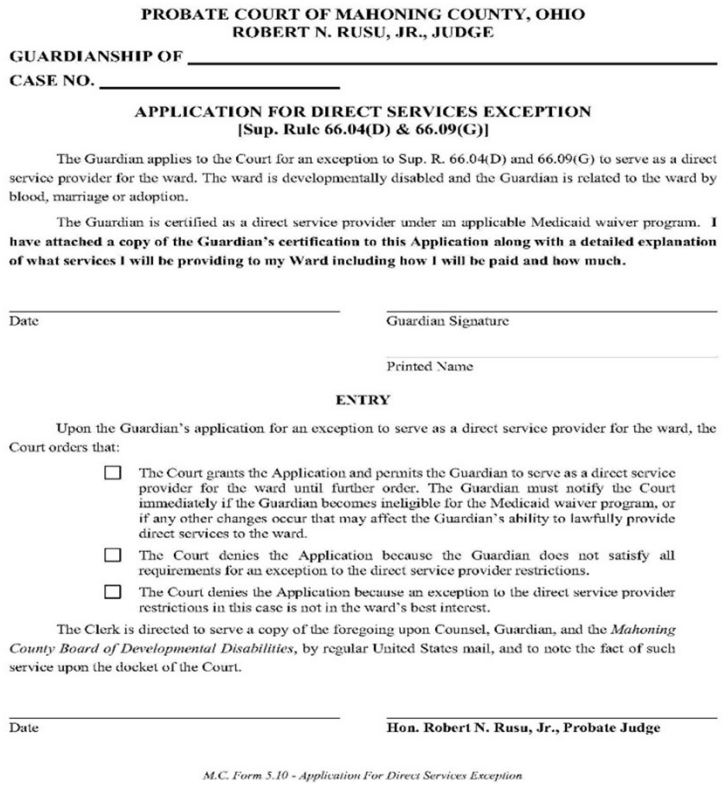
Also, you have Sup. Rule 66.08 (J)(3) which states:

> *"A guardian shall not receive incentives or compensation from any direct service provider providing services to a ward."*

Direct Service Providers and Guardians

But Sup. Rule 66.09(G) states:

"Except as provided in Sup. R. 66.04(D), a guardian shall not provide any direct services to a ward, unless otherwise approved by the court."



PROBATE COURT OF MAHONING COUNTY, OHIO
ROBERT N. RUSU, JR., JUDGE

GUARDIANSHIP OF _____

CASE NO. _____

APPLICATION FOR DIRECT SERVICES EXCEPTION
[Sup. Rule 66.04(D) & 66.09(G)]

The Guardian applies to the Court for an exception to Sup. R. 66.04(D) and 66.09(G) to serve as a direct service provider for the ward. The ward is developmentally disabled and the Guardian is related to the ward by blood, marriage or adoption.

The Guardian is certified as a direct service provider under an applicable Medicaid waiver program. **I have attached a copy of the Guardian's certification to this Application along with a detailed explanation of what services I will be providing to my Ward including how I will be paid and how much.**

Date _____ Guardian Signature _____

Printed Name _____

ENTRY

Upon the Guardian's application for an exception to serve as a direct service provider for the ward, the Court orders that:

- ☐ The Court grants the Application and permits the Guardian to serve as a direct service provider for the ward until further order. The Guardian must notify the Court immediately if the Guardian becomes ineligible for the Medicaid waiver program, or if any other changes occur that may affect the Guardian's ability to lawfully provide direct services to the ward.
- ☐ The Court denies the Application because the Guardian does not satisfy all requirements for an exception to the direct service provider restrictions.
- ☐ The Court denies the Application because an exception to the direct service provider restrictions in this case is not in the ward's best interest.

The Clerk is directed to serve a copy of the foregoing upon Counsel, Guardian, and the *Mahoning County Board of Developmental Disabilities*, by regular United States mail, and to note the fact of such service upon the docket of the Court.

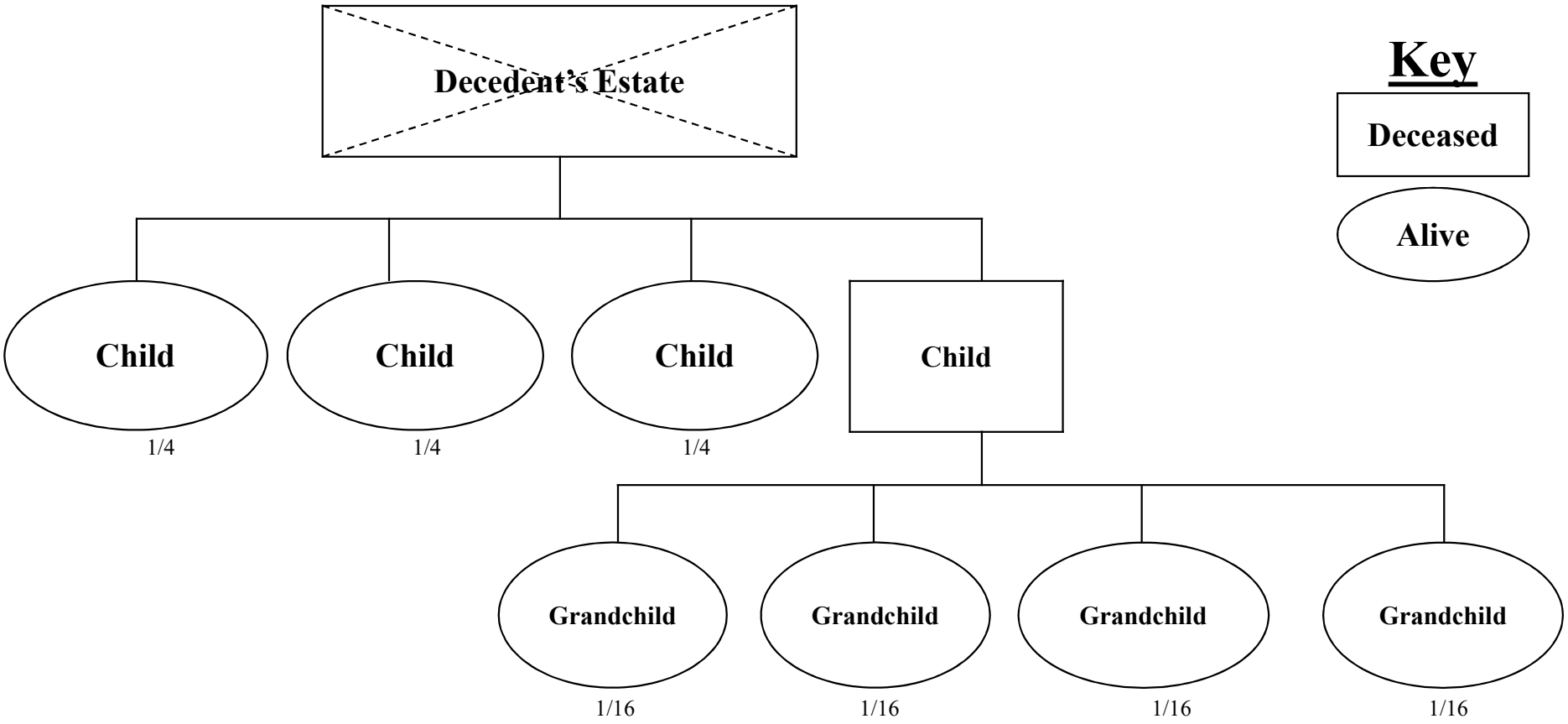
Date _____ **Hon. Robert N. Rusu, Jr., Probate Judge**

M.C. Form 5.10 - Application For Direct Services Exception

Intestate Succession

- R.C. § 2105.11 provides for a *per stirpes* distribution for an intestate estate.
- Further, R.C. § 2105.13 states that if some of the children of an intestate estate are living and some are dead, then the living children would receive what they would have received if all children were living.

Example of R.C. § 2105.13

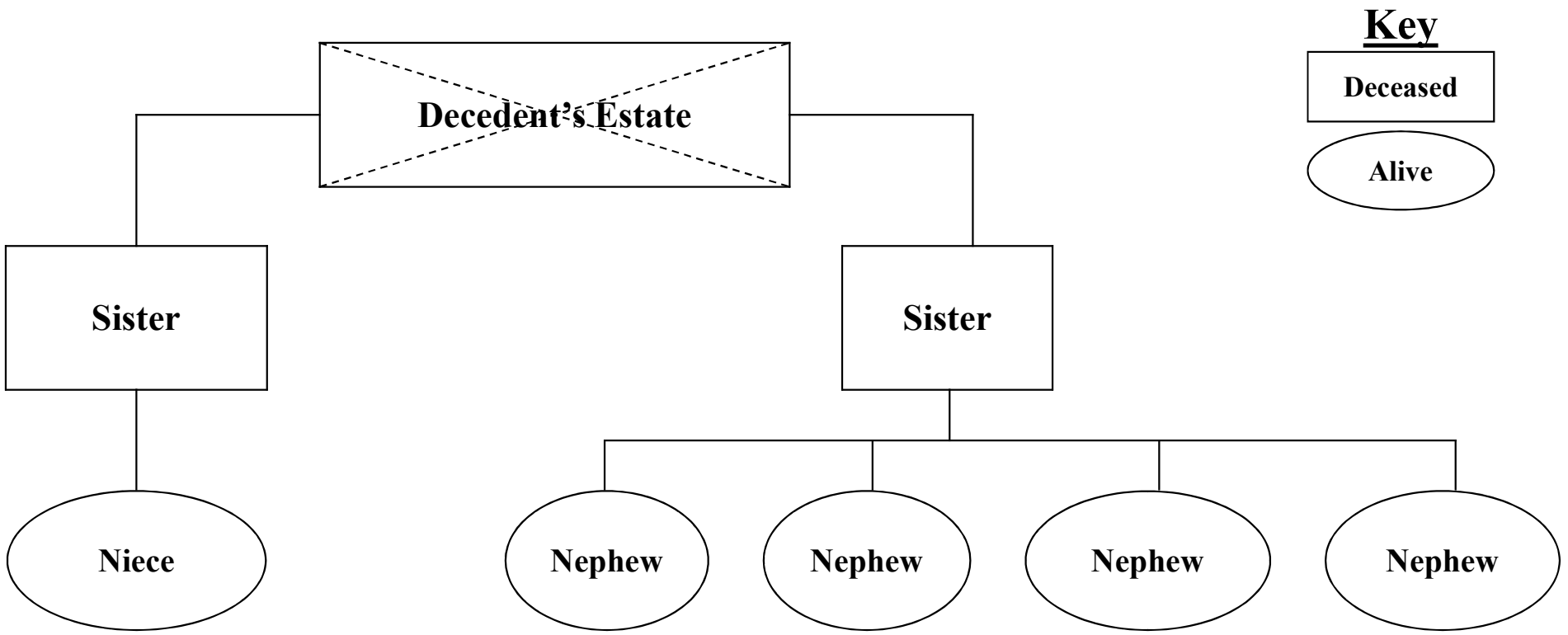


Exception to *per stirpes* distribution

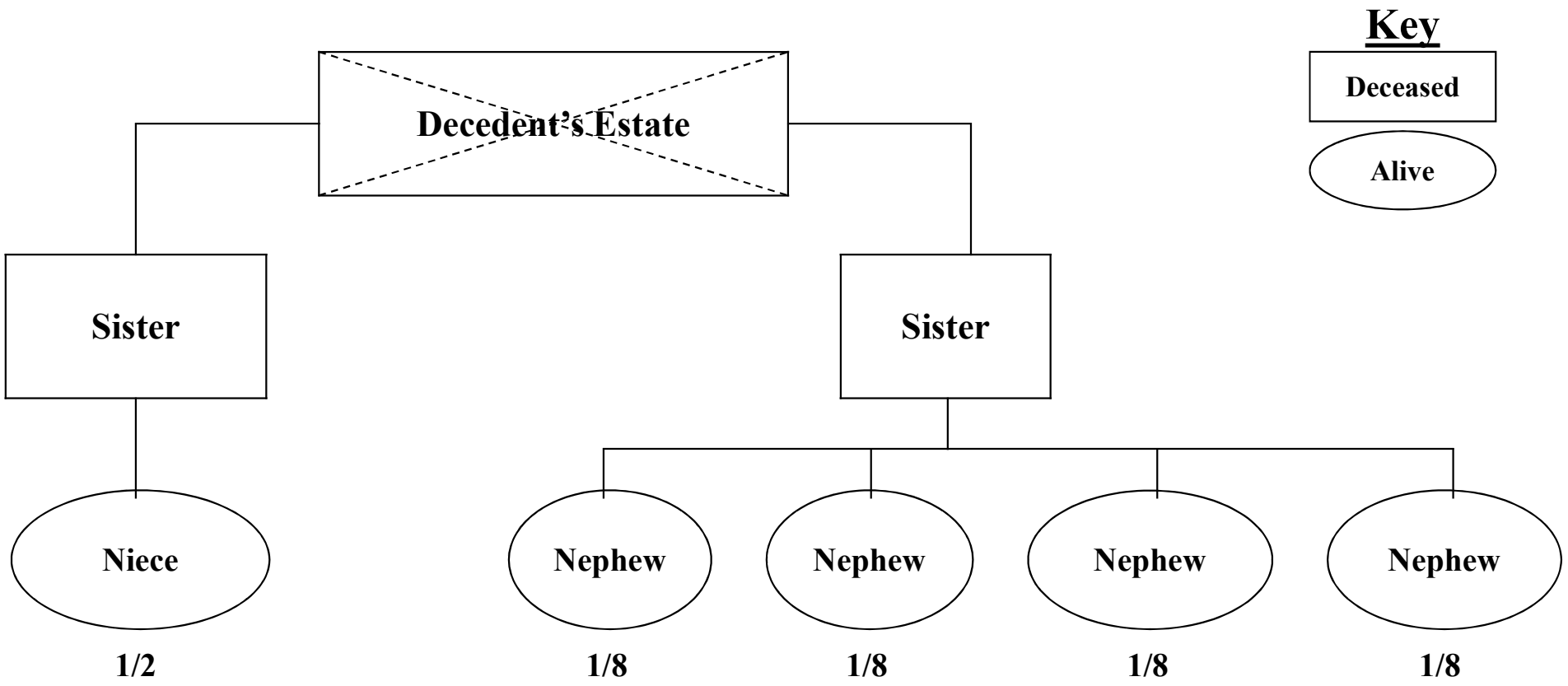
However, the *per stirpes* distribution is subject to R.C. § 2105.12 which provides if the "descendants are on an equal degree of consanguinity then they will share equally.

> *"When all the descendants of an intestate, in a direct line of descent, are on an equal degree of consanguinity to the intestate, the estate shall pass to such persons in equal parts, however remote from the intestate such equal and common degree of consanguinity may be.*"

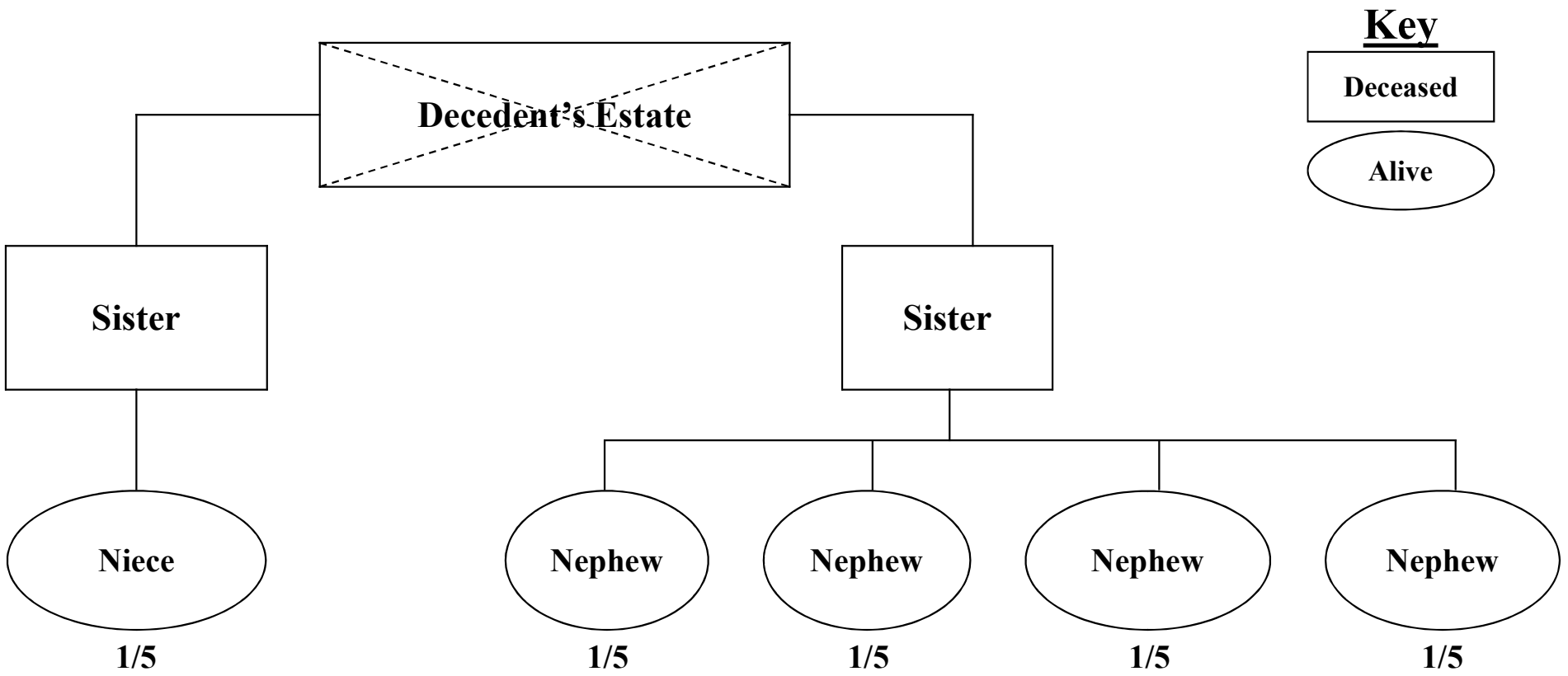
How should this intestate Estate be distributed?



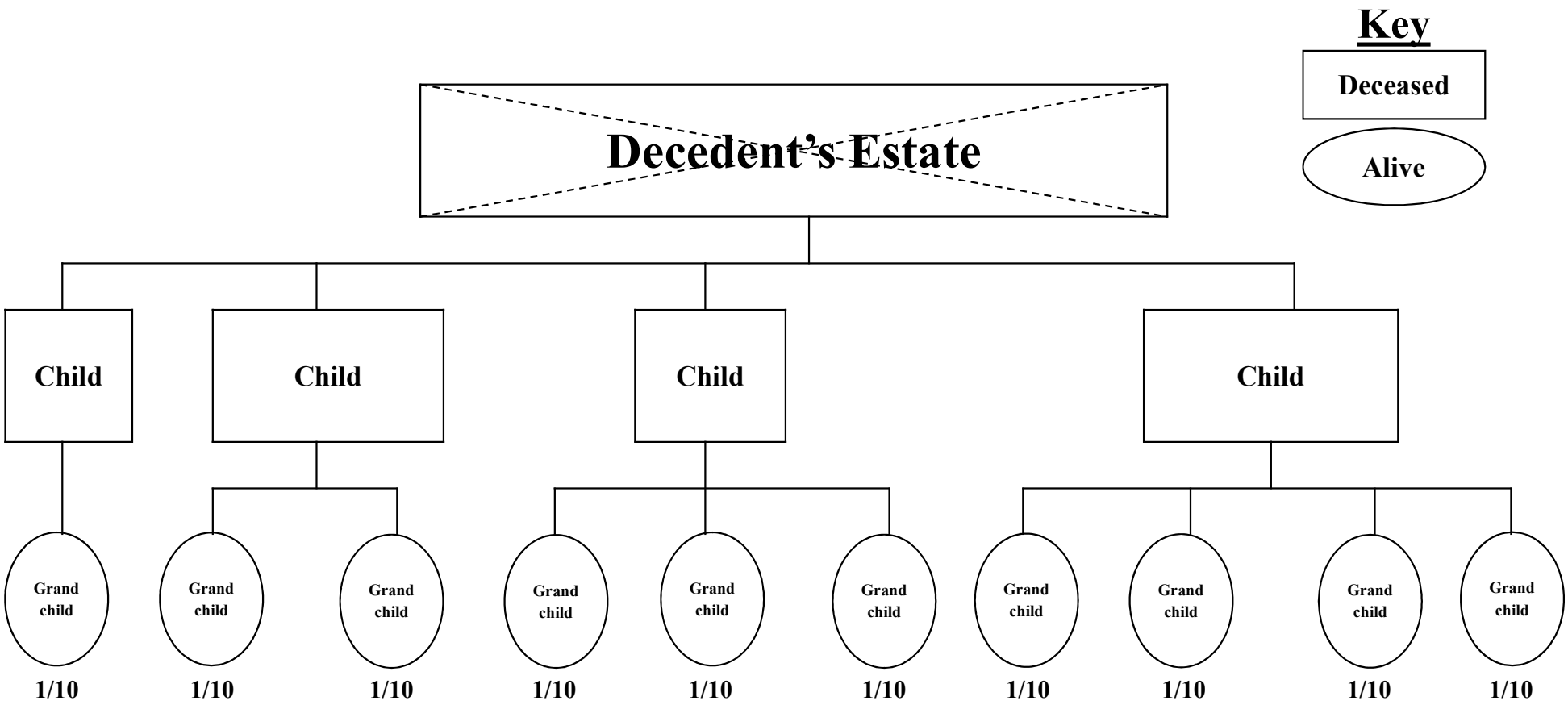
Option #1 – Incorrect

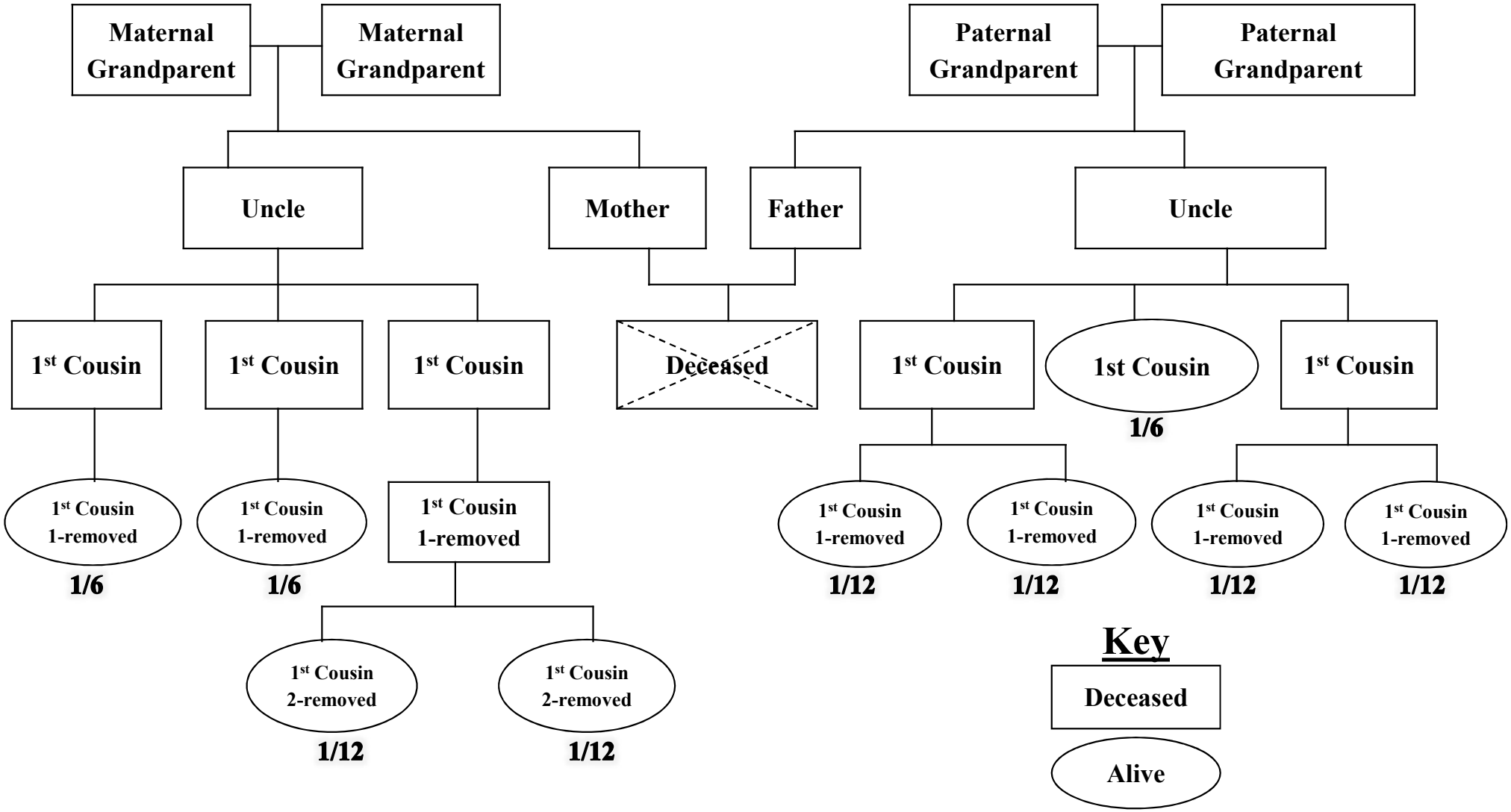


Option #2 - Correct



R.C. § 2105.12 – Descent when all the descendants are of an equal degree of consanguinity.




Maternal Grandparent
Maternal Grandparent
Paternal Grandparent
Paternal Grandparent
Uncle
Mother
Father
Uncle
1st Cousin
1st Cousin
1st Cousin
Deceased
1st Cousin
1st Cousin
1st Cousin
1st Cousin 1-removed
1st Cousin 1-removed
1st Cousin 1-removed
1st Cousin 1-removed
1st Cousin 1-removed
1st Cousin 1-removed
1st Cousin 1-removed
1/6
1/6
1/6
1/12
1/12
1/12
1/12
1st Cousin 2-removed
1st Cousin 2-removed
1/12
1/12
Key
Deceased
Alive

Questions

Trustee Responsibilities

Trust- what is it and what's it used for:

Settler

Trustee

Beneficiary

Types:

Inter vivos / Testamentary

Revocable / Irrevocable

Charitable / not charitable

Exclusive / pooled

Discretionary

Uses:

Control or delay transfer of asset to others without probate;

Shelter assets from creditor;

Qualify or supplement beneficiary's access to government benefit;

Tax or other financial planning

Trustee- How do you become one and what do you do ?

Fidutiary -Defined – RC 2109.01

Mandatory Duties of Trustee - RC 5801-5811:

1. **Administer trust estate**

2. **Loyalty and Impartiality** – RC 5808.02, 5808.03

3. **Prudent Administration** - RC 5808.04 / Skills - RC 5808.06

   -General fidutiary duty of care

   -RC 5808.04 -reasonable care, skill and caution

   -Professional Trustees – special skills

   -Prudent Investor Rule & Standard – RC 5809.01; RC 5809.02

4. **Delegation of Duties**- RC 5808.07 / **Costs** - RC 5808.05

5. **Identification of trust assets / Record keeping** - RC 5808.10

   Trustees Accounts – RC 2109.30 & 2109.303

6. **Enforcement and Defense of Claims** – RC 5808.11

7. **Control and Protection of Assets** – RC 5808.09

   -maintenance and investment

   -insurance

   -security

   -bonding

8. **Inform and Report** – RC 5808.13

-Response to beneficiary's reasonable request

-Annual Report of Trustee: RC 5808.13(C)

Review activity of Trustee;

Changes

Inventory and valuation of assets

Anticipated activity

Concerns / Strategy

Account of income, expenditures and distribution

Records inspection and maintenance policy

Service

Breach of Trust

Breach of Trust (def.) – RC 5810.01

Remedies – RC 5810.01(B)

Neglect

Misconduct

Mismanagement

Action to investigate Trustee's compliance:

-Complaint for Investigation of Trust – RC 2901.49

-Complaint to compel Inspection and Production

-Complaint for Accounting of Trustee

Action due to Trustee's actual misconduct or neglect:

-Complaint to remove Trustee – RC 2109.24; 5807.06

-Complaint for surcharge – RC 2109.42

-Complaint for Concealment of Assets – RC2109.50

Damages for Breach of Trust – RC 5810.02; 5810.04

Jurisdiction:

Subject matter jurisdiction – RC 5802.03

Jurisdiction over Trustee / Beneficiary – RC 5802.02

Governing Law – RC 5801.06

Limitation of Action against Trustee – RC 5810.05

Judge Thomas Baronzzi

Columbiana County Probate

10/06/2023

CASE LAW UPDATE
2023

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

CASELAW UPDATE
Ohio Association of Probate Judges Conference
(with permission) Hon. Elinore Marsh Stormer
Summit County Probate Court
June 2023

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.

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

Personal: Married to Lou Ann Malone Fredericka, 43 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.

Honors: Martindale-Hubbell Peer Review Rating - AV Preeminent, highest rating for professional ethics and legal ability. American Registry – America's Most Honored Lawyers, Top 1%. 2016 Public Official of the Year Award by NASW Ohio Chapter-Region IV.

Teaching Experience: University of Notre Dame - Non-Regular Teaching Staff; Guest Speaker – National College of Probate Judges, Ohio Association of Probate Judges, Trumbull County Probate Practice Seminars, Trumbull County Bar Association Seminars.

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.

Community Service & Organizations: Trumbull County Probate Court Veterans Assistance Program, Trumbull County Senior Court Assistance Program, and Guardian Angels of Trumbull County. 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.

Case Law Update

Hon. Elinore Stormer
Summit County Probate Court

CASE LAW UPDATE — JUNE 2022 – MAY 2023

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OHIO SUPREME COURT

TOPIC: **Abuse of discretion for a probate court to fail to appoint counsel for indigent parents in a timely manner. Delay of 3 years, not timely**
TITLE: ***State ex rel. T.B. v. Mackey,* 2022-Ohio-2493**
COURT: **Supreme Court of Ohio**
DATE: **July 21, 2022**

Given *Y.E.F.*, 163 Ohio St.3d 521, 2020-Ohio-6785, 171 N.E.3d 302, holding that indigent parents have a constitutional right to counsel in adoption proceedings, the probate court acted within its discretion when it stayed the proceedings to accept K.T.'s application for indigent status. While the Court appreciated the difficulties a probate court may have in locating qualified counsel willing to serve, the Court held it is an abuse of discretion to allow a time-sensitive adoption proceeding to languish. Three years is too long.

The probate court should take all reasonable steps, including contacting the county public defender's office and practitioners who appear often before the probate court, to identify potential counsel.

TOPIC: **R.C. 2101.24(A)(1)(c) Gives The Probate Court Exclusive Jurisdiction Over a Co-Executor in the Course of Administering an Estate.**
TITLE: ***Santomauro v. McLaughlin*, Slip Opinion No. 2022-Ohio-2441**
COURT: **Supreme Court of Ohio**
DATE: **July 19, 2022**

In 2013, the Summit County Probate Court appointed Christopher and his brother, Craig, as co-executors of Decedent's estate. Co-executors' sisters filed a civil action in the general division seeking dissolution of the primary asset, a property-management company; the case was settled there however, co-executors repudiated the agreement and engaged in lengthy litigation. A final, appealable order was issued in February 2021, which contained paragraphs pertaining to the probate estate; Christopher and Craig appealed these paragraphs.

The Supreme Court of Ohio granted an alternative writ ordering the parties to submit evidence and file briefs as to the claims that the general division lacked subject-matter jurisdiction as well as personal jurisdiction over co-exeecutors. The Supreme Court of Ohio found that the General Division "patently and unambiguously exceeded its jurisdiction when it attempted to exercise control over the co-executors by directing them to take the actions specified at paragraph Nos. IV and VII of its order." These matters were explicitly within the limited jurisdiction of the probate court and paragraphs IV & VII of the general division's order vacated.

PENDING SUPREME COURT OF OHIO DECISION ARGUED APRIL 2

TOPIC: **Probate Court did not have statutory authority to amend gender marker on birth certificate**
TITLE: ***In re Application for Correction of Birth Record of Adelaide,* 2022-Ohio-2053**
COURT: **Second Appellate District**
COUNTY: **Clark**
DATE: **June 17, 2022**

Adelaide was born in 1973 in Clark County, Ohio; the sex marker on the birth certificate was checked as male. Adelaide filed an application for a change of name pursuant to R.C. 2717.02. and the following month, filed an application for correction of her birth record pursuant to R.C. 3705.15, asking to change the sex marker designation on her birth certificate from male to female.

The probate court found that nothing in R.C. 3705.15 specifically granted the court authority to issue a change in the sex marker unless it was originally made in error. The Appellate Court agreed, stating R.C. 3705.15 by its express terms, permits making corrections not amendments. The significance in the statute is not that R.C. 3705.17 does not explicitly prohibit correcting the sex marker for an individual, it is that the statute does not explicitly allow the probate court to modify or amend any required fact reflected on the birth certificate. On October 11, 2022, The Ohio Supreme Court accepted this case for review. Oral arguments were held on April 2, 2023.

TOPIC: **Failure to register as a putative father within time limit bars right to object to adoption. Father's paternity established through DNA testing by the juvenile court after probate action commenced was not considered.**
TITLE: ***In re Adoption of H.P.*, Slip Opinion No. 2022-Ohio-4369**
COURT: **Supreme Court of Ohio**
DATE: **December 8, 2022**

K.W. failed to register as a putative-father either before or within 15 days after H.P.'s birth. DNA testing after the adoption began established him as bio dad. The appellate court held that probate court correctly determined that K.W.'s consent was not necessary as a putative father. However as K.W. was the bio father, he had a "second status". It found that the probate court should have considered whether K.W.'s consent— "as the legal father with all of the rights and responsibilities that entails"—was necessary under R.C. 3107.07(A). Remand to the probate court to conduct that analysis.

Reversed. Probate court had jurisdiction over H.P.'s adoption proceeding and was authorized to make its determination that K.W.'s consent was not required before K.W. filed in the juvenile court. The probate court required no information beyond the certificate showing no putative father. Likewise, there was nothing to prevent the juvenile court from proceeding with the paternity determination, but under R.C. 3107.01(H) and 3107.06(B)(3), that determination was inconsequential to the adoption proceeding because the determination did not begin prior to the date the adoption petition was filed.

Because K.W. failed to timely register as a putative father or to establish his paternity **prior** to the filing of the petition to adopt H.P., his consent to H.P.'s adoption was not required.

TOPIC: **In re HP part 2. Father lost adoption but petitioned Juvenile Court Judge for visitation. Probate court has exclusive jurisdiction**
TITLE: ***State ex rel. Davis v. Kennedy,* Slip Opinion No. 2023-Ohio-1593**
COURT: **Supreme Court of Ohio**
DATE: **May 16, 2023**

No putative father registered. Bio dad's failure to register in time allowed adoption without his consent to go forward. Thirteen days after adoption petition filed, he filed in juvenile court allocate parental rights. After the probate court ruled that consent was not necessary, the juvenile court judge invoked jurisdiction to establish visitation.

Competing jurisdictional claims between probate and juvenile or domestic relations courts use the jurisdictional-priority rule only when cases in multiple courts of concurrent jurisdiction involve the same parties and when the causes of action are the same or the cases present part of the same whole issue. However, probate and juvenile courts are not courts of concurrent jurisdiction. See R.C. 2101.24 and 2151.23.

Here juvenile court had jurisdiction to grant genetic testing as a juvenile court has exclusive jurisdiction to determine the paternity of any child born out of wedlock. R.C. 2151.23 (B)(2). After the genetic testing was complete, the juvenile court's jurisdiction over the child became

subordinate to the probate court. Juvenile judge however, continued to exercise jurisdiction by appointing a guardian ad litem with the intention to rule on the motion for parenting time. Supreme Court says no -the probate court has exclusive jurisdiction over a preadoption placement which prevents juvenile court jurisdiction from issuing temporary orders for parenting time.

See also:

TOPIC: **Juvenile Court properly dismissed parentage complaint after adoption filed.**
TITLE: ***In re A.R.W.*, 2022-Ohio-2874**
COURT: **Fourth Appellate District**
COUNTY: **Washington**
DATE: **August 16, 2022**

In putative father's action seeking to establish parenting rights and motion to intervene in underlying petition for adoption, juvenile court did not err in dismissing parentage complaint and in denying the motion for lack of jurisdiction since putative father's filings occurred after the adoption action was in progress and a decision on parentage was irrelevant to the adoption proceeding. Further, putative father lacked standing to file a Civ. R. 60(B) motion to vacate judgment because he was not a party to the adoption proceeding

COURTS OF APPEAL

ADOPTIONS

The Supreme Court of Ohio has repeatedly held that any exception to the requirement of parental consent [to adoption] must be strictly construed so as to protect the right of natural parents to raise and nurture their children.

"No burden is to be placed upon the non-consenting parent to prove that his failure to communicate was justifiable." Rather, the statute is drafted "to require petitioner to establish each of his allegations," including lack of justifiable cause. While the non-consenting parent must come forward with evidence to show some facially justifiable cause for failing to have contact with the child, the burden is ultimately on the petitioner to prove that no justifiable cause exists. Justifiable cause' is not defined in R.C. 3107.07.

TOPIC: **Adoption Petitioner need only prove either de minimis contact or failure of maintenance and support. R.C. 3107.07.**
TITLE: ***In re Adoption of A.M.M.,* 2023-Ohio-7**
COURT: **Ninth District Appellate**
COUNTY: **Summit**
DATE: **January 4, 2023**

In stepmother's petition to adopt children, trial court did not err in finding that mother's consent was not required where, even if mother prevailed in her argument that she was justified in not

having more than de minimis contact with children during year prior to filing adoption petition, she failed without justifiable cause during the look-back period to provide for the maintenance and support of the children.

This Court has referenced the 'explicit terms' of R.C. 3107.07 and held that "a petitioner wishing to adopt need only prove *either* that the natural parent failed to communicate *or* failed to provide maintenance and support."

The Ohio Supreme Court recently reiterated that the "disjunctive relationship of the contact and support provisions in [Section] 3107.07(A)" indicates that "a parent's failure to meet either provision is sufficient to nullify the need to obtain that parent's consent." *In re Adoption of A.K.*, 168 Ohio St. 3d 225, 2022-Ohio-350, ¶ 17, 198 N.E.3d 47, citing *In re Adoption of A.H.*, 9th Dist. Lorain No. 12CA010312, 2013-Ohio-1600, ¶ 9.

CONSENT REQUIRED

TOPIC: **Justifiable cause where father wrote and texted**
TITLE: ***In re Adoption of B.G.H.,*** **2022-Ohio-1911.**
COURT: **Fifth District Appellate**
COUNTY: **Tuscarawas**
DATE: **June 3, 2022**

Because cases like these involve the termination of fundamental parental rights, the petitioning party has the burden of proving by clear and convincing evidence that the parent failed to have more than de minimis contact with the child during the requisite one-year period and there was no justifiable cause for the failure.

Clear and convincing evidence must be beyond a preponderance of the evidence but does not need to be beyond a reasonable doubt. De minimis contact is not statutorily defined but is generally determined to be contact – either attempted or successful – beyond a single occurrence. *In re J.D.T.*, 7th Dist. Harrison No. 11 HA 10, 2012-Ohio-4537, 978 N.E.2d 602; *In re Adoption of K.A.H.*, 10th Dist. Franklin No. 14AP-831, 2015-Ohio-1971. (More effort is required than one-time contact).

The trial court did not err in requiring biological father's consent for the adoption since father made more than a de minimis effort to contact child where father timely paid his child support, father texted child on more than 30 days within the applicable one-year period, and father told child he loved her and missed her, asked about her day, and asked about her activities, holidays, family, and health.

TOPIC: **Bio father fulfilled general duty of maintenance and support when incarcerated during look back period but continued to provide money to family members for minor child's maintenance and support,**
TITLE: ***In re Adoption of F.W.G. v. Blazo*****, 2022-Ohio-2650**
COURT: **Seventh Appellate District**
COUNTY: **Mahoning**

DATE: July 12, 2022

Biological father arrested a week after Child's birth but was released 60 days later and had weekly visits until July 2019 when he was arrested and sentenced to prison until 2032. Appellees received legal custody of Child and filed a subsequent adoption petition. The trial court found that the biological parents' consent was not necessary for the adoption to proceed.

The appellate court found the evidence established that the father gave more than a thousand dollars to his sister and mother to provide for the child while incarcerated and that with this money they bought the child food, clothing, socks, cups, toys, and books. The court found that father did not intend to abandon the child and that he provided for child as best as he could under the circumstances. Judgment reversed and remanded.

TOPIC: A probate court can look beyond one year period in re de minimis contact.
TITLE: *In re Z.H.,* 2022-Ohio-3926
COURT: Sixth District Appellate
COUNTY: Williams County
DATE: November 3, 2022

Grandparents had custody of daughter and wished to adopt. There was no support order, grandparents could provide for child and never requested support. Failure to request support is justifiable cause for no payments.

As for contact, here, the probate court specified that it reviewed evidence "not only in the one year look back period but since the date of placement [in January of 2019]," which it was authorized to do.

We emphasize that the issue to be resolved is not ***whether mother could have done more to contact her child but whether she did enough***, such that it can be said that it was "more than de minimis." The record is clear that, during the relevant one-year time period, mother made several attempts to contact Z.H., but grandparents thwarted every attempt by mother to reinsert herself into Z.H.'s life. Consent required

TOPIC: Mother's "every attempt" to support child to best of her ability is more than de minimus support
TITLE: *In re Adoption of R.R.,* 2022-Ohio-4813
COURT: Fourth District Appellate
COUNTY: Jackson
DATE: December 29, 2022

Mother had frequent contact with custodian while mother was incarcerated, she wrote and sent items to child both before and after her period of incarceration, and she attempted to initiate child support order during look-back period. Custodian did not ask for support from mother, made it clear that mother's contribution was not necessary, and did not permit mother to have contact with child. We agree with the trial court that this appellee had, at every turn, attempted to

provide support for her child to the best of her ability and this is not the type of situation when a parent's consent to adopt is not required.

INTERFERENCE BY PETITIONER

TOPIC: **Mother denied all attempts at visitation, so justifiable cause**
TITLE: ***In re Adoption of A.R.Z.*, 2022-Ohio-4810**
COURT: **Fourth District Appellate**
COUNTY: **Ross**
DATE: **December 28, 2022**

Father's lack of contact justifiable where mother engaged in a pattern of impeding the father's attempts to develop and maintain a relationship with the child. Mother unilaterally cut off visitation and refused to resume it, despite father and stepmother's insistence. The mother also failed to respond to any of father's attempts to communicate with the child or to reestablish visitation, she shutdown her Facebook communication without informing the father, and she moved residences with the child without informing the father of the move or of her new address.

TOPIC: **Justifiable cause where mother significantly discouraged contact**
TITLE: ***In re Petition for Adoption of A.V.*, 2022-Ohio-2969.**
COURT: **Sixth District Appellate**
COUNTY: **Sandusky**
DATE: **August 24, 2022**

Mother and Father have two children, a son and a daughter, but were never married and are now apart. Mother married stepmother who petitions to adopt the daughter but not the son. Court found the parties' relationship "is clearly acrimonious with the tension among all 3 parties noticeable during court interactions." It observed that mother and stepmother "were clearly in the position of authority and control." It concluded that mother's "significant discouragement" of contact between father and daughter "rises to the level of justifiable cause."

Father has regular contact with son but testified that he was afraid to demand to see daughter because mother can—and has—made unilateral decisions that have prevented him from seeing his son. Visitation is through agreement, not the court and father did not seek court help. Mother conceded that she did not want him to have a relationship with the daughter

TOPIC: **Father denied access to child**
TITLE: ***In re Adoption of W.M.*, 2023-Ohio-1365**
COURT: **Eighth District Appellate**
COUNTY: **Cuyahoga**
DATE: **April 27. 2023**

Probate court found that stepfather failed to establish by clear and convincing evidence that bio father failed to have de minimis contact with the child for the one-year look back period. Specifically, the court found that father had supervised visits with the child in the year leading up

to the adoption petition filing, that the mother interfered with father's access to the child, and father attempted to establish a support order.

TOPIC: **Consent req'd where bio parent made continuous efforts to see child but custodians denied access citing concerns over COVID-19.**
TITLE: ***In re Adoption of A.O.P.*, 2022-Ohio-2532**
COURT: **Twelfth Appellate District**
COUNTY: **Clermont County**
DATE: **July 25, 2022**

Appellants received custody of Child over Mother's objections and Mother received visitation at Appellants' discretion. Appellants filed an adoption petition and Mother objected; biological father failed to object. Appellants allowed Mother to have a one-hour visit with Child at a visitation center and a second visit at a local fast-food restaurant. After these visits, Appellants refused visitation with Child despite Mother's repeated requests citing concerns over the COVID-19 pandemic. Mother continued to communicate with Appellants and asked for FaceTime visits, which Appellants struggled to facilitate due to technological issues. The trial court found that Mother had more than de minimis contact with Child during the look-back period and even if she had not, justifiable cause existed due to Mother's personal circumstances and the COVID-19 pandemic. Aff'd

CONSENT NOT REQUIRED

TOPIC: **Father's consent was not required as he had only de minimis contact with child during year preceding filing of adoption petition.**
TITLE: ***In re Adoption of M.M.*, 2023-Ohio-397**
COURT: **Sixth Appellate District**
COUNTY: **Huron**
DATE: **February 10, 2023**

Father's attempts to contact child were minimal, he regularly visited child's sibling who lived in same home as child but did not include child in visits, he was not precluded from contacting mother and stepfather regarding child, and he failed to provide evidence that mother refused his requests to see child in order.

TOPIC: **Failure to seek judicial relieve from protection order or use other means of contact - no justiciable cause**
TITLE: ***In re Adoption of J.R.I.,* 2023-Ohio-475**
COURT: **Second Appellate District**
COUNTY: **Greene**
DATE: **February 17, 2023**

Although a civil protection order issued against father prevented contact with child and father was later incarcerated, he failed to attempt to obtain modification of the protection order or to use other means to sustain his relationship with the child. Because father did not seek to enforce

parental rights prior to the date that the adoption petition was filed, he did not have justifiable cause for failing to have contact with the child.

TOPIC: **Support is more than just money**
TITLE: ***In re Adoption of H.L.W.B.,* 2022-Ohio-3161.**
COURT: **Second District Appellate**
COUNTY: **Clark**
DATE: **September 9, 2022**

Birthmother had no contact with child and only child support payment in years was Covid stimulus money plus $236. Court noted that she did nothing to support the child in any way.

TOPIC: **Failed attempts at contact are not contact when no interference**
TITLE: ***In re Adoption of A.W.*, 2022-Ohio-3360**
COURT: **Sixth District Appellate**
COUNTY: **Huron**
DATE: **September 23, 2022**

The only effort that appellant made to contact his child during this period was a Myspace message and an unsuccessful visit to the clerk's office at juvenile court. Where interference has not been demonstrated, ("failed attempts to communicate are not communication"). Therefore, Petitioners met their burden of demonstrating no justifiable cause for father's lack of contact with A.W. for more than a year prior to the adoption petition.

TOPIC: **Incarceration alone is not justifiable cause for failure to support**
TITLE: ***In re Adoption of M.T.R.*, 2022-Ohio-2473**
COURT: **Fifth District Appellate**
COUNTY: **Licking**
DATE: **July 13, 3022**

For issues of maintenance and support the Supreme Court of Ohio has developed a three-step analysis. The court must determine **(1)** law or judicial decree requirements of parent in the requisite year, **(2)** determine if parent complied with these requirements, and **(3)** if parent failed to comply was there justifiable cause. *In re Adoption of B.I.*, 157 Ohio St.3d 29, 2019-Ohio-2450, 131 N.E.3d 28, ¶ 14. *In re A.K.,* 168 Ohio St. 3d 225, 2022-Ohio-350.

Here, there was no judicial decree in place, so father was subject to a general obligation to support his child pursuant to R.C. 3103.03. The biological father did not contest that he failed to comply with his general support requirement. The court held father’s incarceration was not justifiable cause for failure to support child, noting he had the child’s mailing address and the mother’s work address.

BEST INTEREST

TOPIC: **In determining child's best interests, contesting party does not need to prove current placement is the least detrimental alternative if not contesting that fact. Petition denied**
TITLE: ***In re Adoption of J.A.M.,* 2022-Ohio-2313**
COURT: **Second District Appellate**
COUNTY: **Greene**
DATE: **July 1, 2022**

The court held a best interests hearing relying on R.C. 3107.161(C) which places two burdens on the contesting party, (1) to provide material evidence to determine the best interests of the child and (2) establish that the child's current placement is not the least detrimental available alternative. Petitioner must still ultimately prove adoption is in the best interests of the child.

Here, the mother provided clear and convincing testimony that the adoption was not in the best interests of the child analyzed by the court under the first criterion. However, she did not argues the second The Court held that the second criterion is only relevant if placement is a disputed issue. Otherwise, placement is not a relevant issue impacting the child's best interest or adoption.

The mother believed her child lived in a safe, loving, and supportive environment at her father and step-mother's home. Mother also proved that she could provide a similar environment. The court held adoption would not be in the best interest of the child because it would terminate the child's ability to ever resume a relationshiop with mother.

FAILURE TO FILE OBJECTION WITHIN 14 DAYS BARS OBJECTION

Per R.C. 3107.07(K), the notice must clearly inform the recipient that he is required to file an objection to the petition within 14 days. Under R.C. 3107.07(K), the 14-day objection period begins when proof of service of notice is filed with the trial court.

TOPIC: **Request for counsel does not extend the 14 day objection period**
TITLE: ***In re Adoption of G.W.K.,* 2022-Ohio-2620.**
COURT: **Ninth District Appellate**
COUNTY: **Wayne**
DATE: **August 1, 2022**

Mother was served and 30 days later requested counsel. Counsel filed motion for leave to file objections. Court held a pretrial and subsequently found that the 14 day objection period cannot be extended. Probate court has no authority to extend the deadline irrespective of whether the trial court might find good cause for an extension.

TOPIC: **Strict 14-day window for written objection unchanged by phone call**
TITLE: ***In re Adoption of A.M.M.,* 2022-Ohio-2719.**
COURT: **Third District Appellate**

COUNTY: **Hancock**
DATE: **August 8, 2022**

Bio parents placed children with petitioners. Adoption was personally served on bio parents when they appeared in court with bold notice of objection. They neither objected nor appeared at the hearing. On appeal, dad said that he called the clerk to ask how to object. But, a mere verbal request for information cannot be considered a proper objection to an adoption petition. Anything short of filing an objection fails under R.C. 3107.07(K).

ADOPTION PROCEDURE

TOPIC: **No requirement to grant a continuance of proceedings where bio dad did not communicate with his counsel until the day of hearing.**
TITLE: ***In re Petition for Adoption of C.E.B.,*** **2022-Ohio-3286**
COURT: **Seventh District Appellate**
COUNTY: **Mahoning**
DATE: **August 30, 2022**

Where a party moves to continue, a court should consider "(1) the length of the delay requested; (2) if any prior continuances were requested and received; (3) the inconvenience to the parties and the court; (4) if the continuance is for legitimate reasons; (5) if the party requesting the continuance contributed to the circumstances giving rise to the request; and (6) any other relevant factors..

It was Appellant's duty per court order to contact his counsel and inform him of any available information or evidence necessary for his representation in this matter and Appellant had no explanation why he chose not to contact his counsel. Further, while the stated purpose of the continuance was to allow counsel to locate certain witnesses, he did not inform the court who those witnesses were or what testimony they would be expected to give, other than it would address the issue of consent.

TOPIC: **Denial of continuance when mom had notice aff'd- no consent required.**
TITLE: ***In re J.R.A.,*** **2022-Ohio-3014**
COURT: **Fifth District Appellate**
COUNTY: **Tuscarawas**
DATE: **August 30, 2022**

Denial of continuance for failure to appear approved where mother had notice. Mother had placed child with petitioners. Her last contact was at final custody hearing.

TOPIC: **Mother representing herself no entitled to a continuance to obtain witnesses**
TITLE: ***In re Adoption of S.T.M.,*** **2023-Ohio-38**
COURT: **Fifth District Appellate**
COUNTY: **Tuscarawas**
DATE: **January 9, 2023**

Mother basically had no contact with or financial support for her child. However, she did ask to bring in witnesses with a continuance and CA upheld court decision to deny.

TOPIC: **Failure to timely object to Magistrate decision bars objection**
TITLE: ***In re Adoption of A.J.T.,*** **2022-Ohio-2619.**
COURT: **Ninth District Appellate**
COUNTY: **Lorain**
DATE: **August 1, 2022**

Father argued only that his attorney did not receive a copy of the magistrate's decision until September 1, seven days after the magistrate's decision was filed. Although Father implied that his attorney's delayed receipt of the decision was akin to untimely service by the clerk, he cited no authority to support his position. Father did not dispute that service of the decision was timely completed under Civ.R. 5 (B)(2)(c) by the clerk mailing a copy to his attorney. Under these circumstances, Father has failed to demonstrate that the trial court erred by failing to grant him an extension of time to object to the magistrate's decision. Father's assignment of error is overruled.

TOPIC: **Trial court must conduct an independent review of the case before adopting magistrate's decision. Objecting party must provide the court a transcript of the proceedings if it raises factual issues. Civ.R. 53(D)(3)(b)(iii).**
TITLE: ***In re J.S.,*** **2022-Ohio-2502**
COURT: **Eighth Appellate District**
COUNTY: **Cuyahoga**
DATE: **July 21, 2022**

The trial court adopted the magistrate's decision. Mother objected to the magistrate's findings, but did not file a transcript of the proceedings. The trial court overruled mother's objections. While a transcript was filed with appellate court, the reviewing court may not consider the transcript since it was not available for the trial court's review.

NO SERVICE

TOPIC: **Service of notice NOT complete because a "C-19" notation did not constitute a signature under Civ.R. 4.1(A)(1)(a). Civ. R. 60 (B) motion to vacate granted**
TITLE: ***In re Adoption of M.J.A.*****, 2022-Ohio-3275**
COURT: **Twelfth District Appellate**
COUNTY: **Butler**
DATE: **September 19, 2022**

Probate Court served notice of adoption petition on bio mom via certified mail 16 days before hearing. Mother did not object and the petition was granted. Mother moved to vacate the decision for failure of service which probate court granted.

The record indicates that the mail carrier, made a "C-19" notation on the return receipt filed with the probate court. Mother testified she never received the notice.

Such a notification does not constitute a "signature" or a receipt "signed" by a person as required by Civ.R. 4.1(A)(1)(a). Service of process during the Covid-19 pandemic demanded innovation and flexibility, which is particularly true here. But, Court found no evidence to demonstrate conclusively that Mother received notice. (And it was 16 days, not 20 days before the hearing.)

ATTORNEYS

TOPIC: **Attorney disqualification requires moving party to show a significant risk that alleged conflict will taint the trial.**
TITLE: ***Shteiwi v. Shteiwi,*** **2023-Ohio-873**
COURT: **Twelfth Appellate District**
COUNTY: **Butler**
DATE: **March 20, 2023**

An attorney should not be disqualified solely on allegations of conflict of interest which is upon the moving party to establish. Even if an attorney's continued representation would violate one of the Canons of the Code of Professional Responsibility, counsel should not be disqualified unless the attorney's conduct poses a significant risk of tainting the trial. *Creggin Group, Ltd. V. Crown Diversified Industries Corp.,* 113 Ohio App.3d 853, 858, 682 N.E.2d 692 (12th Dist. 1996). Here the moving party failed to establish disqualifying the attorney would pose a risk of tainting the trial. Further, the moving party failed to establish how the conflict contributed to any error in the probate court's decision.

ATTORNEY FEES

TOPIC: **Concealment/Attorney Fees Can consider bad faith**
TITLE: ***Pirock v. Crain*****; 2022-Ohio-3612**
COURT: **Eleventh Appellate District**
COUNTY: **Trumbull**
DATE: **October 11, 2022**

Plaintiffs-surviving children's action against defendants-brothers for concealing cash and coins that were part of parents' estates, resulted in a jury verdict against one defendant. Trial court erred in finding that the American Rule barred plaintiffs' request for attorney fees where, although R.C. 2113.36 did not apply because plaintiffs' attorney was not employed by the executor or administrator of the estate, defendant was found to have concealed estate assets, and the trial court erred in failing to consider if the "bad faith" exception to the American Rule applied. Case remanded to trial court to make that determination.

TOPIC: **Proper for court to deny contingent attorney fees in Medicaid settlement**
TITLE: **In re Estate of Hunter, 2023-Ohio-1197**
COURT: **Tenth Appellate**
COUNTY: **Franklin**

DATE: April 11, 2023

Attorney Lindsey was hired to administer the estate of Dessie Hunter. The state of Ohio had asserted a Medicaid estate recovery claim against the estate of $156,476.12, which was later waived. Lindsey indicated that a charged contingent fee was based on his efforts in negotiating the state of Ohio's full waiver of the Medicaid recovery claim. Linsey claimed the probate court abused its discretion in not allowing the fees after failing to apply the reasonableness factors of Professional Rule of Conduct 1.5(a).

An attorney bears the burden of proving the reasonableness of the fees. A contingent fee agreement between an attorney and an estate administrator generally must be preapproved by the probate court. Sup.R. 71(I), Loc.R. 71.8 of the Franklin County Probate Court.

Attorney Lindsey's request was denied and he was awarded $18,180 of the requested fees of $23,471.41. The court denied the request for two reasons. 1) The contingent fee was not preapproved by the court and 2) Attorney Lindsey did not meet his burden of proof in showing the amount was justified by the time spent on the reduction of the Medicaid Recovery Claim. Further the court determined the Medicaid claim waiver was inevitable once the relevant information regarding the estate was provided to the state of Ohio.

TOPIC: Legal malpractice/Standing/Privity
TITLE: *White v. Sheridan*; 2022-Ohio-2418
COURT: Tenth Appellate District
COUNTY: Franklin
DATE: July 14, 2022

In executor/beneficiary's legal malpractice action against attorney for negligently causing decedent's home to pass to daughter rather than to executor/beneficiary, summary judgment in favor of attorney on reasoning that executor/beneficiary lacked standing was error where, although attorneys are not liable to third parties under strict privity rule, decedent's claim for legal malpractice survived his death pursuant to R.C. 2305.21 and executor is in privity with decedent and may sue for negligence in estate planning.

CONCEALMENT

TOPIC: Joint Responsibility of transferee of concealed assets
TITLE: *Mancz v. McHenry*, 2022-Ohio-3256
COURT: Second Appellate District
COUNTY: Greene
DATE: September 16, 2022

This is part of an ongoing saga dating to 2007 involving Calista McHenry. Multiple judgments found that Calista abused a power of attorney during the principal's lifetime and later concealed assets from the decedent's estate. During the pendency of the POA abuse and Concealment claims, Calista transferred assets to her husband Robert, or into accounts that were jointly owned

by them. The fiduciary of the estate who brought the concealment actions and was awarded judgment is still seeking to recover assets from Calista and Robert to satisfy the judgment.

Robert claimed that he should not be responsible for the judgments against his wife, or only half of it, because he was a joint owner of their property. The probate court was unpersuaded. The Court of Appeals affirmed.

TOPIC: **Guilty verdict in concealment is not fraud. Probate court will not vacate final and distributive account on the basis of fraud, unless separately proven by clear and convincing evidence**
TITLE: ***In re Estate of Crain,*** **2023-Ohio-571**
COURT: **Eleventh Appellate District**
COUNTY: **Trumbull**
DATE: **February 27, 2023**

Probate court did not misapply the law in denying plaintiffs motion to vacate judgment approving and settling the fiduciary's final account in the state of their deceased father. The plaintiffs never asserted a fraud claim against their sibling, and Ohio law did not support the proposition that the guilty verdict against the sibling in a concealment action was tantamount to a finding of fraud. There are separate elements and standards of proof for concealment and fraud, the guilty verdict against the sibling in the concealment action was not functionally equivalent to a finding of fraud pursuant to R.C. 2109.35(A).

ESTATES

TOPIC: **Court justified in removing administrator for convincing heir to transfer all assets to administrator.**
TITLE: ***In re Estate of Nugent,*** **2023-Ohio-700**
COURT: **Tenth Appellate District**
COUNTY: **Franklin**
DATE: **March 7, 2023**

Ms. Nugent was the sole beneficiary of her brother's $2.1 million estate. George Nugent died intestate, but administrator of the estate, Ms. Thompson claimed he was in the process of writing a will and leaving the contents of his estate to her. Ms. Nugent stated she wanted to follow her brother's wishes and signed a document transferring her entire interest in the estate to Ms. Thompson.

Ms. Thompson did not act in the benefit of Ms. Nugent as decedent's only heir. Ms. Nugent committed a per se violation of her fiduciary duty of loyalty by performing an action personally beneficial to herself and detrimental to Ms. Nugent while serving as administrator.

PROCEDURE

TOPIC: **Court may compel discovery against defaulted party**
TITLE: ***Hogg v. Grace Community Church*****; 2022-Ohio-3516**

COURT: **Twelfth Appellate District**
COUNTY: **Fayette**
DATE: **October 3, 2022**

In plaintiffs-heirs' action against defendants-church beneficiary and decedent's investment manager company asking the court to declare that decedent's investment accounts were assets of his estate and to issue an injunction to prohibit manager from transferring funds from decedent's accounts during the pendency of the action, trial court did not err in compelling investment manager to respond to plaintiff's discovery requests and to retain counsel since manager was a party to the action, even though it did not appear or defend itself and default judgment was issued against it, manager was not exempt from discovery that the trial court deemed appropriate pursuant to Civ. R. 26, and manager, as a corporate entity, was required to appear only through counsel.

TOPIC: **Order to return property not a final appealable order when**
TITLE: ***In re Estate of Notarian*; 2022-Ohio-2927**
COURT: **Eleventh Appellate District**
COUNTY: **Geauga**
DATE: **August 22, 2022**

In executrix's concealment action against trustees of family trust, resulting in a judgment requiring trustees to return four parcels of property to the probate estate, trustee's appeal of the transfer back order is dismissed for lack of a final appealable order since, while the concealment action is a special proceeding for purposes of R.C. 2505.02(B)(2), the judgment on appeal did not affect a substantial right and therefore may be appealed only after the trial court determines whether restitution is owed. R.C. 2109.50.

When a trial court grants a monetary award that is left unresolved, a final, appealable order does not exist." Robinson v. Robinson, 9th Dist. Summit No. 21440, 2003-Ohio-5049, ¶6.

TOPIC: **Court cannot award summary judgment based on issue preclusion/collateral estoppel if not a final appealable order**
TITLE: ***Robinholt v. Wilson,* 2023-Ohio-248**
COURT: **Ninth Appellate District**
COUNTY: **Lorain**
DATE: **January 30, 2023**

The trial court erred when awarding summary judgment to the brother on the sister's complaint based on collateral estoppel and issue preclusion. The court's February 22, 2018 judgment entry only found the brother's motion for sanctions and attorney fees well-taken and it set the matter for a further hearing. The hearing never took place because the brother dismissed his motion for sanctions and attorney fees based on reaching a settlement agreement with his sister's former attorney. Because the probate court never awarded fees or sanctions to the brother, the February 22, 2018 judgment entry was not a final appealable order and did not collaterally estop the sister from filing suit.

TOPIC: **Cannot Raise Defenses for First Time on Appeal**
TITLE: ***Budz v. Somerfield*; 2023-Ohio-155**
COURT: **Second Appellate District (Appeal from Common Pleas Court)**
COUNTY: **Montgomery**
DATE: **January 20, 2023**

In action by plaintiffs-deceased's sister and niece against defendants-estate and fiduciary-relative seeking reimbursement for repairs made to defendants' real property following tornado, arising from dispute about ownership of the property, summary judgment in favor of plaintiffs was not error where defendants did not file a memorandum in opposition to plaintiffs' motion for summary judgment, defendants did not seek summary judgment on grounds that plaintiffs' claim was barred by res judicata on the basis of a related action, the timeliness of the action was not challenged under the statute of limitations in R.C. 2117.12, and defendants cannot raise defenses for the first time on appeal.

TOPIC: **Court may only review for plain error when no objection to magistrate's decision is timely filed.**
TITLE: ***Estate of Stotz v. Stotz,* 2023-Ohio-663**
COURT: **Sixth Appellate District**
COUNTY: **Sandusky**
DATE: **March 3, 2023**

Eric Stotz died, leaving a last will and testament. The will included an in terrorem clause providing that any heir challenging the contents shall not be able to any benefit from his estate. Jane Stotz challenged the terms of her late husband's will, claiming she was owed more money on a life insurance policy and shared interest of the home. The probate court held that appellant's complaint triggered the application of a broadly worded in terrorem clause in the will. The court ruled appellant sought to alter the will, not simply clarify it. Because appellant failed to file a timely objection the magistrate's decision, her appeal is only reviewable for plain error. Civ.R (D)(3)(b)(iv). The trial court did not deviate from any legal rule or commit any obvious errors.

TOPIC: **Survivorship damages and wrongful death damages are separate awards**
TITLE: ***Cunning v. Windsor House, Inc.,* 2023-Ohio-352**
COURT: **Eleventh Appellate District**
COUNTY: **Trumbull**
DATE: **February 6, 2023**

A compensatory damages cap for noneconomic damages of medical claims pursuant to R.C. 2323.43(A)(2) does not apply to the jury's $500,000 award on the estate's wrongful death claim. A violation of Ohio's Nursing Home Resident' Bill of Rights (NHRBR) provides for compensatory damages under R.C. 3721.17 and that, "there is no language in the statute that prohibits an additional recovery under the common law." Thus, there is no double-recovery of compensatory damages. The jury was able to award damages of $70,803.13 for the negligence of staff to compensate for decedent's injuries as survivorship claim non-economic damages as well as the $500,000 for violating decedent's rights under the NHRBR.

TOPIC: **Failure to file timely claim or contingent claim bars claim**
TITLE: ***Havens v. Havens*; 2022-Ohio-3103**
COURT: **Twelfth Appellate District**
COUNTY: **Fayette**
DATE: **September 6, 2022**

In plaintiff's action against defendant's-sister's estate and other siblings, asserting that he had made an oral contract for repayment of financial assistance that he had provided to sister over a period of many years, summary judgment in favor of defendants was not error since plaintiff failed to present claims following sister's death within the time limit allowed under R.C. 2117.06(C), and he failed to present a contingent claim to extend the time to make a claim on the estate pursuant to R.C. 2117.37.

TOPIC: **Magistrate's Ruling Adopted, When no Transcript of Record-Surviving spouse may take house with negative equity as part of spousal share**
TITLE: ***Estate of Hatcher-Hamilton v. Hamilton*, 2022-Ohio-1834**
COURT: **Ninth Appellate District**
COUNTY: **Summit**
DATE: **June 1, 2022**

Decedent passed away and left her husband and her daughter. Her will left her real and personal property to daughter whom she nominated as executrix. Daughter filed the estate inventory at $0. Decedent's husband filed a spousal election against the will and an election under R.C. 2106.10 to receive the house as part of his spousal elective share. Daughter refused to transfer the property and husband filed a motion to compel, providing evidence that the house's value was $315,000 but had $85,000 negative equity due to outstanding debts.. The magistrate found the house had to be transferred to husband and the trial court affirmed after daughter failed to file a transcript of the hearing with the objection.

Appellate court found that the trial court properly adopted the magistrate's decision when Daughter failed to file a transcript with her objection and that trial court was required to reject Daughter's claims that husband kept $40,000 of estate assets consisting of jewelry, retirement benefits, and life insurance. Appellate court also found that without a transcript and a failure to develop any other argument on appeal, the factual findings of the magistrate must stand; judgment affirmed.

TOPIC: **Probate Court Presumes Prejudice When Failing to Order a Transcript of Record Concealment case**
TITLE: ***Lucarell v. Sait,* 2022-Ohio-4279**
COURT: **Eleventh Appellate District**
COUNTY: **Trumbull**
DATE: **November 30, 2022**

After a two-day trial in December 2021, the probate court found appellant guilty of wrongfully possessing $6,800.00 worth of tangible personal property belonging to the decedent's estate. Appellant was ordered to pay this amount to the estate plus a mandatory ten percent penalty.

Probate court did not order a transcript of the witness testimony. Appellant also did not order preparation of the transcript for purposes of appeal. Had he done so, the probate court's failure to follow the mandate of *R.C. 2109.50* would have been harmless error. *See Mancz v. McHenry*, 2d Dist. Montgomery No. 24728, 2012-Ohio-3285, 974 N.E.2d 784, ¶ 13 (concluding the appellant was not prejudiced by the probate court's failure to order the transcript because the court reporter's transcription was made part of the probate court's record.)

Nevertheless, because the court held that it is the original obligation of the probate court to order the transcript and provide a record in this special statutory proceeding—and because the failure to do so renders the court unable to review the merits of appellant's remaining arguments—the court presumes prejudice. Accordingly, this argument is well taken and requires a remand.

EQUITABLE ESTOPPEL –UNJUST ENRICHMENT

TOPIC: **No equitable estoppel where Decedent did not bait Appellants into caring for her in exchange for real property, but simply changed her mind.**
TITLE: **In re Estate of McDaniel, 2023-Ohio-1065**
COURT: **Seventh Appellate**
COUNTY: **Carroll**
DATE: **March 30, 2023**

Appellants moved onto decedent's farm and placed a double-wide mobile home on the property. Appellants claim, decedent agreed that if they took care of her they could have the entire property when she died. Appellants claim reliance on this contract when placing mobile home on the property. Decedent filed a transfer on death affidavit stating these facts. However, decedent filed multiple transfer on death affidavits concerning the property depending on which relative was in her good favor at the time.

The court did not find an oral contract through clear and convincing evidence, and awarded the farm to the those who had the most recent transfer of death affidavit filing. The court held claims of equitable estoppel had no merit. However, due to affixing their home on the property the Appellees were found to be unjustly enriched and ordered to pay Appellants fair value (approx.. $116K) for the structure affixed on the property.

TOPIC: **Moving party must prove undue influence by clear and convincing evidence**
TITLE: ***Bernholtz v. Bernholtz,* 2022-Ohio-4764**
COURT: **Sixth Appellate District**
COUNTY: **Fulton**
DATE: **December 29, 2022**

Son transferred real property and money from his mother's bank account after gaining power of attorney. Son found to use undue influence in the money transfers was not against the manifest

weight of the evidence because these transactions were electronic and mother did not know how to use her debit card to make online purchases. However, the case was remanded for a new trial in regards to the real property transfers because the evidence introduced was only unfounded speculation and not clear and convincing. He said/she said on the matter of the property transfers. Mother also testified that she never felt her son exerted undue influence over her affairs.

TOPIC: **One hour of time not enough to effectively execute and explain trust to a client known to lack capacity**
TITLE: ***Carpenter v. Carpenter,*** **2023-Ohio-274**
COURT: **Seventh Appellate District**
COUNTY: **Belmont**
DATE: **January 27, 2023**

Summary judgment was proper when an attorney was found to use undue influence in executing a trust. One hour of time was found to be inadequate to determine the decedent's capacity to execute a trust and understand the legal effect of the trust. The court effectively ruled in favor of administratrix because of attorney's intentional interference with her expectation of inheritance.

TOPIC: **Where decedent had five year oral contract statute of frauds barred agreement but remand to consider unjust enrichment to employer**
TITLE: **Subel v. AMD Plastics, L.L.C., 2023-Ohio-1139**
COURT: **Eighth Appellate**
COUNTY: **Cuyahoga**
DATE: **April 6, 2023**

Decedent worked at AMD as a sales agent for several years before dying in December 2018. The estate claims AMD agreed to pay decedent a 2% commission on all sales of certain parts and tools for five years, and if Subel passed away the commissions were to be paid in monthly installments to his wife Carol. The estate claims AMD represented these terms would be reduced to writing. Decedent never received a contract and sent an email memorializing the terms to AMD before passing away. Carol seeks enforcement of the contract to the estate, claiming breach of contract and unjust enrichment.

An enforceable contract needs a meeting of the minds as to which the essential terms must be reasonably certain and clear and mutually understood by the parties. *Kostelnik v. Helper*, 96 Ohio st.3d 1, 2002-Ohio-2985, 770 N.E.2d 58, ¶16-17 quoting *Rulli v. Fan Co*., 79 Ohio St.3d 374, 376, 683 N.E.2d 337 (1997). The estate presented evidence of text messages and emails which would leave a question of whether a purported agreement existed. However since contract could not be performed in one-year the purported agreement is barred by the statute of frauds.

Ohio law allows unjust enrichment as an alternative theory in recovery, which operates in the absence of an express or implied contract. *Cantlin v. Smythe Cramer Co.,* 2018-Ohio-4607, 114 N.E.3d 1260, ¶41 (8th Dist.), citing *Gallo v. Westfield Natl. Ins. Co*., 8th Dist. Cuyahoga No. 91893, 2009-Ohio-1094, ¶19. The Estate demonstrated the existence of material fact as to

whether AMD was unjustly enriched by decedent's performance and not entitled to summary judgment on this claim.

REAL PROPERTY

TOPIC: **Real Property/Transfer/Specific Performance**
TITLE: ***Hanahan v. DPA Dev., L.L.C.;*** **2022-Ohio-3843**
COURT: **Second Appellate District**
COUNTY: **Montgomery (Civil Appeal from Common Pleas Court)**
DATE: **October 28, 2022**

In executor's action against defendant for failure to transfer title of decedent's portion of split property under decedent's purchase agreement, court granted judgment for specific performance to transfer title. Subsequent motions by executor for contempt for failure to transfer title, where defendant then challenged an option to purchase provision in the purchase agreement. CA found that the trial court erred, on remand, in deciding the option to purchase issue since it had been settled in a prior final judgment. A related issue regarding a purported agreement by the parties for a parking license was remanded.

SETTLEMENT AGREEMENTS

TOPIC: **A written settlement between estate and heir was not enforceable due to lack of consideration. Hearing required**
TITLE: **Sowry v. Todd, 2023-Ohio-1162**
COURT: **Second Appellate**
COUNTY: **Miami**
DATE: **April 7, 2023**

Two sisters Sowry and Todd are the only heirs to Dorothy Boggs Estate. Decedent's estate was to go into a previously established trust with 70% to Sowry and 30 % to Todd. Sowry, as executor filed action against Todd claiming embezzlement for funds transferred from Sowry's and decedent's joint accounts equally nearly $100K. After some litigation an oral agreement was reached between the sisters. Ryan Todd (husband of one sister, non-lawyer, recorded the terms of the settlement, after which both parties signed. Todd wants settlement agreement enforced and Sowry states contract is unenforceable for lack of consideration.

The parties gave conflicting testimony as to the understanding of the agreement. The magistrate initially found the agreement to be enforceable. However, when the existence of a settlement agreement is in dispute, the trial court must conduct an evidentiary hearing prior to entering judgment enforcing the purported agreement. *Rulli v. Fan Co*., 79 Ohio St.3d 374, 683 N.E.2d 337 (1997). After review, the court found Todd offered no consideration to support an enforceable agreement. Todd claims adequate consideration came in two regards 1) by agreeing to give up her right to see the judicial process through, and 2) by avoiding future fees and litigation expenses. The court did not find these arguments availing. Todd's acceptance of Sowry's gratuitous promises did not convert them into an enforceable contract. The matter is remanded for further proceedings.

TOPIC: **Justifiable for Court to remove appellant as administrator for breaching her fiduciary duties.**
TITLE: ***In re Estate of Nugent,* 2023-Ohio-700**
COURT: **Tenth Appellate District**
COUNTY: **Franklin**
DATE: **March 7, 2023**

Ms. Nugent was the sole beneficiary of her brother's $2.1 million estate. George Nugent died intestate, but administrator of the estate, Ms. Thompson claimed he was in the process of writing a will and leaving the contents of his estate to her. Ms. Nugent stated she wanted to follow her brother's wishes and signed a document transferring her entire interest in the estate to Ms. Thompson.

Ms. Thompson did not act in the benefit of Ms. Nugent as decedent's only heir. Ms. Nugent committed a per se violation of her fiduciary duty of loyalty by performing an action personally beneficial to herself and detrimental to Ms. Nugent while serving as administrator.

GUARDIANSHIP

TOPIC: **Appointment/Standing**
TITLE: ***In re Guardianship of Marks*; 2022-Ohio- 2495**
COURT: **Eighth Appellate District**
COUNTY: **Cuyahoga**
DATE: **July 21, 2022**

Appointing a non family member professional guardian of appellant's son with developmental disabilities, is affirmed where evidence showed that the son has difficulty communicating his needs and caring for himself, and his family was unable to help him identify his needs when he lived with them. R.C. 2111.02(C). Also, mother lacked standing to claim that the magistrate did not protect her son's statutory rights to counsel since these rights belong to the alleged incompetent for whom a guardianship application is filed. R.C. 2111.02(C)(7).

TOPIC: **Appointment/Incompetency**
TITLE: ***In re Guardianship of S.B.*; 2022-Ohio-3249**
COURT: **Fifth Appellate District**
COUNTY: **Richland**
DATE: **September 15, 2022**

In attorney's application for appointment as guardian of alleged incompetent person, trial court did not err in finding that appellant was incompetent and in appointing attorney as guardian where appellant suffered injury and was the subject of a prior guardianship. Expert evaluations showed that appellant was incapable of caring for himself and provided the medical opinion that a guardianship should be established.

TOPIC: **Denial of Appointment**
TITLE: ***In re Guardianship of Pond*; 2022-Ohio-4023**
COURT: **Fifth Appellate District**
COUNTY: **Delaware**
DATE: **November 10, 2022**

Denial of son's application for appointment as guardian of his mother and appointment of attorney as mother's guardian is affirmed where son agreed to a finding of mother's incompetence at hearing, but his opinions about his mother's capabilities were not consistent, there was evidence that son's opinions about his mother were closely linked to giving him the greatest control over his mother's finances, he was accused by others of financially taking advantage of his mother, and less restrictive options in the form of power of attorney or trust would not sufficiently protect his mother, due to her incompetence.

TOPIC: **Marriage Request Denied**
TITLE: ***In re Guardianship of Kendell*; 2022-Ohio-3456**
COURT: **Second Appellate District**
COUNTY: **Miami**
DATE: **September 30, 2022**

Trial Court denied ward's request to get married on reasoning that she lacked the mental capacity to enter into a marital contract is affirmed. There was evidence, *inter alia*, that the ward needs guidance to carry out daily life and that she could not conduct business affairs or properly care for herself without the aid of a guardian, and evaluations by psychologists described ward's poor decision-making. However, she will have an opportunity, through her future actions, to show that she truly understands the nature of the marriage contract and is capable of consenting to taking on the mutual obligations inherent in a marriage contract.

TOPIC: **Res Judicata bars argument of guardianship appointment being improper after challenging party failed to challenge at trial court.**
TITLE: **In re Guardianship of Whitmer, 2023-Ohio-1084**
COURT: **Ninth District Appellate**
COUNTY: **Summit**
DATE: **March 29, 2023**

On June 21, 2021, the probate court appointed Mary as guardian for 94-year-old Margaret. Margaret had executed durable powers of attorney for health care and property naming Claire and Robert as co-agents. Robert died unexpectedly, and Claire never properly objected to the magistrate's decision to name Mary guardian. Four months later Claire filed an application to terminate guardianship which was denied.

Claire's argument is improper and barred by res judicata which bars the consideration of issues that could have been raised on direct appeal. Claire cannot challenge Mary's appointment when she failed properly do so.

A guardianship can only be terminated pursuant to R.C. 2111.47 either upon proof that the necessity for guardianship no longer exists, or the letters of appointment were improperly issued. Claire's argument that executive powers of attorney existed and made the appointment improper lacks merit. The court did not err pursuant to R.C. 2111.02 finding, a probate court does not improperly issue letters of guardianship when it considers a POA but determines the lesser restrictive mean is not appropriate.

TOPIC: **Continued guardianship ordered for schizophrenic and bipolar appellant after a medical professional testified for his competence.**
TITLE: **In re Guardianship of Markle, 2023-Ohio-1271**
COURT: **Fifth District Appellate**
COUNTY: **Tuscarawas**
DATE: **April 18, 2023**

Ohio law presumes that once an individual is found to be incompetent, he or she remains incompetent, but this presumption is rebuttable. A guardianship must be terminated upon 'satisfactory proof' that the necessity for guardianship no longer exists. R.C. 2111.47.

Here, the court did not abuse its discretion after weighing the balance of the evidence. Appellant has lengthy history of guardianships, releases and relapses. Appellant was able to talk about diagnosis but not treatment or medications. The court found doctor's testimony that after one meeting appellant could take care of himself unpersuasive. Further, appellant's parents testified in support of continued guardianship. Continuation of guardianship upheld.

King, J., dissents – The possibility that a ward may return to incompetency is not sufficient to overcome the evidence presented of present competence. Probate court erred in not terminating the guardianship.

TOPIC: **Question of Fact Whether Guardian Acted in His Capacity as Attorney-In-Fact or For His Own Benefit under Civ.R. 56(C)**
TITLE: ***Thomas v. Delgado*; 2022-Ohio-4235**
COURT: **Third Appellate District**
COUNTY: **Putnam**
DATE: **November 28, 2022**

In plaintiff's multi-claim action alleging self-dealing by defendant-decedent's attorney in fact, the trial court erred in granting defendant summary judgment in light of the evidence that the defendant effected a series of cash withdrawals from decedent's bank accounts, signing the majority of withdrawal slips in his individual capacity, and also completed a series of cashier's check withdrawals made out to various companies and persons, almost all of which were signed by the defendant in his individual capacity, with the result that genuine issues of material fact existed as to the validity of the transfers from decedent's accounts that defendant executed allegedly for his own benefit.

JURISDICTION

TOPIC: Jurisdictional Priority Probate has jurisdiction over trust claims and is not barred by separate action in general divisio
TITLE: *State ex rel. Minshall v. Swift*; 2022-Ohio-2158
COURT: Sixth Appellate District
COUNTY: Erie
DATE: June 23, 2022

In brothers dispute about division of deceased mother's property where one brother filed a petition for a writ of prohibition to prevent judge in probate court from exercising jurisdiction over trust claims on the basis of jurisdictional priority because of a pending case in the general division of common pleas court, prohibition is denied since the probate court has general subject matter jurisdiction over the trust claims, authorizing the judge to resolve specific challenges to that jurisdiction, there was no showing of patent and unambiguous lack of jurisdiction, and petitioner can challenge probate court rulings through a direct appeal.

TOPIC: Settlement/Jurisdiction
TITLE: *Jacobson v. Gross*; 2022-Ohio-3427
COURT: Eighth Appellate District
COUNTY: Cuyahoga
DATE: September 29, 2022

Heir's action in probate court alleged breach of fiduciary duty by mother, as an individual and as trustee, for enabling embezzlement of trust assets. Parties reached a settlement agreement, but one child challenged the agreement in the general division. CA held the probate court did not err in granting heir's motion to enforce the agreement since it had plenary power to enforce the agreement because the complaint was properly before the court and the agreement flowed from the complaint, the probate court did not lose jurisdiction when mother was dismissed as an individual because the remaining parties and claims were left intact, and the probate court's jurisdiction was first invoked so it had jurisdiction under the jurisdiction-priority rule.

MENTAL HEALTH

All Affirmed

TOPIC: Judgment Declaring Appellant a Mentally Ill Person Subject to Court-Ordered Hospitalization Affirmed.
TITLE: *In re J.L.S.*; 2022-Ohio-3539
COURT: Tenth Appellate District
COUNTY: Franklin
DATE: October 4, 2022

The judgment declaring appellant a mentally ill person subject to court-ordered hospitalization is affirmed since physician provided testimony that appellant suffered from mental illness which substantially disturbed his mood and resulted in gross impairment of judgment. There was also evidence that appellant threatened others with violence and presented a substantial risk of physical harm to others, pursuant to R.C. 5122.01(B)(2).

TOPIC: **Probate Court's Ruling That Appellant is Subject to Outpatient Court-Ordered Treatment is Affirmed.**
TITLE: ***In re Ezeh*; 2022-Ohio-4033**
COURT: **First Appellate District**
COUNTY: **Hamilton**
DATE: **November 14, 2022**

The probate court's ruling that appellant is subject to outpatient court-ordered treatment and that the least restrictive setting for his treatment was behavioral healthcare facility, after being found incompetent to stand trial in criminal proceeding, was not error since expert testimony presented clear and convincing evidence that appellant was mentally ill, that he represented a substantial risk of physical harm to others as evidenced by threats to staff and patients, and that he refused to engage in treatment or take medication.

TOPIC: **Judgment Finding Appellant to be a Mentally Ill Person Subject to Involuntary Civil Commitment Affirmed.**
TITLE: ***In re E.S.*; 2023-Ohio-382**
COURT: **Tenth Appellate District**
COUNTY: **Franklin**
DATE: **February 9, 2023**

Judgment finding appellant to be a mentally ill person subject to involuntary civil commitment is affirmed where physician testified that appellant suffers from a disorder which caused him to be unable to function in the community, physician was not precluded from reviewing statements of another physician contained in R.C. 5122.11 affidavit and incorporating those statements into his ultimate opinion as to whether appellant is a mentally ill person subject to court order. Physician also formed his assessment of appellant based on his own examination, while appellant did not submit testimony of expert psychiatrist to rebut physician's opinions.

TOPIC: **SMJ does not become moot when a person found to have a mental illness is released from in-patient care**
TITLE: ***In Re: Ndubuisi Ezeh,* 2022-Ohio-4033**
COURT: **First Appellate District**
COUNTY: **Hamilton**
DATE: **November 14, 2022**

Although Ezeh was released from Summit Behavioral Healthcare, he was still subject to court-ordered treatment. Also, Ezeh has a history of hospitalization for mental illness. Because Ezeh's mental health issues and treatment are ongoing his appeal is not considered moot. The probate

court's ruling placing Ezeh under court-ordered treatment was based on competent, credible evidence.

NAME CHANGES

TOPIC: Name Change should not consider racial/gender stereotypes only Child's Best Interests
TITLE: *In re Name Change of A.P.W.*, 2022-Ohio-2017
COURT: Tenth Appellate
COUNTY: Franklin
DATE: June 14, 2022

Mother filed an application to change Child's name from "A.P.W. II" to "P. Gabriel K-W". Father's objected to the addition of "Gabriel" and elimination of "A" from Child's name. Child liked to be called "P" because Father's name is also "A", but Child started referring to himself as "A.P.". Mother stated that she wanted to remove "A" from Child's name because she believed that it put Child at a societal disadvantage due to the name being associated with a certain race. Trial court found that removing "A" from Child's name was not in Child's best interest but granted the removal of the "II" and added the hyphenated last name; Mother appealed.

On appeal, Mother argued that because Father recently had another son, he could name that son "A"; appellate court rejected this argument finding that giving Father's name to another child could impact Father and Child's relationship. Appellate court also firmly rejected Mother's claim that removing "A" from Child's name would avoid racial stereotypes and that the court would not and should not consider gender or racial stereotypes as a reason to change Child's name, especially when the name change is not in the child's best interest; judgment affirmed.

TOPIC: Denial of Inmate Application Due to Public Policy re Victims
TITLE: *In re Name Change of Blevins*; 2022-Ohio-4812
COURT: Fourth Appellate District
COUNTY: Ross
DATE: December 28, 2022

The denial of an inmate's application for name change was not in error since the name change would adversely affect the rights of victim's family and friends and the parole authority's ability to monitor the inmate when released from prison, and the name change would contravene public policy to protect and promote victim's rights, R.C. 2717.09. Additionally, the inmate could challenge the trial court's adoption of the magistrate's decision without first filing objections since the magistrate's decision did not advise the inmate that a party cannot assign error unless the party timely and specifically objects to that finding or conclusion in the decision. Civ.R. 53(D)(3)(a)(iii).

TOPIC: Discussion during Divorce Proceedings Concerning Changing a Minor's Name Does Not Waive later Objection to a Name Change
TITLE: *In re Name Change of E.S.*, 2022-Ohio-2107
COURT: Tenth Appellate

COUNTY: Franklin
DATE: June 21, 2022

Mother and Father were married and had twin boys but divorced. Two weeks after the finalization, Mother filed a name change application for the twins to hyphenate their last name to include Mother's birth name as Mother was returning to her birth name. Mother's application was granted and Father objected. The trial court adopted the magistrate's decision and granted the name changes; Father appealed.

On appeal, Father alleged that Mother waived the name change issue in the divorce settlement. Appellate court found that Mother stated during divorce settlement negotiations her intent to have her birth name restored and that she would seek to have the children's names changed to include her surname; Father argued that the name change conversation was "tabled" during the divorce proceedings because it was causing delays and that because Mother did not readdress the issue before the finalization, she abandoned the issue and thus waived her right to change the children's surname. Appellate court further found that neither the divorce decree nor the shared parenting plan contained any provision concerning the name change for the minor children.

TOPIC: A Parent May Not Pay another Parent for the Right to or Prevention of Changing a Minor Child's Name.
TITLE: *In re Name Change of C.L.F.,* 2022-Ohio-2300
COURT: Tenth Appellate
COUNTY: Franklin
DATE: June 30, 2022

Child's parents never married, but Child spent an equal amount of time with both parents who were each designated as a residential parent. Father filed a name change to either change Child's surname to Father's surname or hyphenate Child's surname with both parents'surnames. During the DR case, there wasan agreement to change Child's surname to Father's surname as "part of a global settlement on a number of issues", but the agreement was not completed.
Eventually, Father paid Mother $10,000, for medical and education expenses.

The probate magistrate granted Father's request to hyphenate Child's surname, finding it in the child's best interest. The trial court found that any past agreement between Child's parents did not relieve the applicant from proving that a name change was presently in the child's best interest.

On appeal, Father argued that the $10,000 payment to Mother was for the right to change Child's surname to Father's surname. Appellate court stated that the Supreme Court has been explicitly clear that any sort of quid pro quo regarding changing a child's name is explicitly prohibited and that "a child is an independent being and his or her name is not a piece of property to be bargained over." The appellate court stressed the "best interest of the child" standard and found that the trial court did not abuse its discretion when it granted Father's alternative request of changing the child's surname to be Mother and Father's surnames hyphenated and that such a change was in the best interest of the child; judgment affirmed.

PROCEDURE

TOPIC: **Probate Court abused its discretion in not allowing Appellant to file any pleadings or motions until $100 fine for contempt was paid.**
TITLE: ***Jowiski v. Gustafson-Jowiski,* 2022-Ohio-2816**
COURT: **Ninth Appellate District**
COUNTY: **Lorain**
DATE: **August 15, 2022**

During court proceedings, the magistrate held wife in direct contempt of court for calling him a "male chauvinist pig" (MCP). She was ordered to pay $100 fine, and imposed a 7-day jail sentence (suspended). The wife failed to pay the fine before the following court date. The magistrate ordered the wife pay the fine before filing any additional pleadings, including objections to the magistrate's decision. The magistrate directed the Clerk of Courts to not accept any filings from wife until she paid the fine.

The Appellate Court concluded the trial court abused its discretion by not allowing the wife to file additional pleadings until she paid the $100 contempt of court fine. The magistrates order imposed a direct burden on the wife as she could not object to his decision, and affected the issues she could raise on appeal. This case was remanded to the trial court allowing wife to object to the magistrate's decision to include any issues relevant to appeal proceedings.

TOPIC: **Denial of Appeal for Lack of Appealable Order**
TITLE: **In re Estate of Goubeaux, 2023-Ohio-647**
COURT: **Second District Appellate**
COUNTY: **Darke County**
DATE: **March 3, 2023**

R.C. 2107.46 authorizes a fiduciary or beneficiary to file a separate action in probate court to obtain judicial guidance concerning a will, the property to be administered, or the rights of the parties involved. Second, the same objective can be accomplished by filing a separate declaratory-judgment action in probate court.
A final order construing a decedent's will under either R.C. 2107.46 or the declaratory-judgment act would dispose of that action and would have preclusive effect in related probate proceedings Such an order would be appealable immediately.

Here, the parties did not proceed through a separate action under R.C. 2107.46 or the declaratory-judgment act. Instead, they raised their arguments about construction of the decedent's will in the will-probate proceeding itself. The trial court undoubtedly had authority to resolve the controversy in that context, as R.C. 2101.24(A)(1)(k) vests a probate court with exclusive jurisdiction to construe wills. But unlike an order construing a will under R.C. 2107.46 or the declaratory-judgment act, the trial court's July 5, 2022 entry is interlocutory because the probate action remains pending with unresolved issues.

TOPIC: **If no timely objection to the magistrate's decision is filed, then a claim for plain error is the only reviewable argument**

TITLE: **In re Estate of Stotz v. Stotz, 2023-Ohio-663**
COURT: **Sixth District Appellate**
COUNTY: **Sandusky County**
DATE: **March 3, 2023**

A party must file a written objection to a magistrate's decision within 14 days of filing the decision. Except for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion unless the party has objected as required by Civ.R. 53(D)(3)(b)."

As noted above, appellant did not object to the magistrate's decision in this case, opting instead to directly appeal the trial court's decision adopting the magistrate's decision. Consequently, Civ.R. 53(D)(3)(b)(iv) applies, and appellant's arguments are reviewable only for plain error. *See Lake Twp. V. Walbridge*, 6th Dist. Wood No. WD-21-008, 2021-Ohio-3761, ¶ 31 ("If an appellant does not file timely objections to the magistrate's decision as required by Civ.R. 53(D)(3)(b), that party cannot assert *any* error on appeal related to that decision '[e]xcept for a claim of plain error.' Civ.R. 53(D)(3)(b)(iv).").

"[I]n order for a court to find plain error in a civil case, an appellant must establish (1) a deviation from a legal rule, (2) that the error was obvious, and (3) that the error affected the basic fairness, integrity, or public reputation of the judicial process and therefore challenged the legitimacy of the underlying judicial process." Here, the appellant did not establish the court committed any obvious errors.

TOPIC: **Probate has exclusive jurisdiction over determination of heirship**
TITLE: **Allen v. Milligan, 2023-Ohio-917**
COURT: **Seventh District Appellate**
COUNTY: **Belmont County**
DATE: **March 22, 2023**

The probate court complaint clearly requests the determination of heirship. It states that it is filed pursuant to R.C. 2105.06(I), which is the Statute of Descent and Distribution identifying lineal descendants if there are no living paternal or maternal grandparents of the deceased. The probate court has exclusivity to decide such matters. R.C. 2101.24(A)(1)(c). Whenever property passes by the laws of intestate succession, or under a will to a beneficiary not named in such will, proceedings may be had in the probate court to determine the persons entitled to such property. R.C. 2123.01.

TRUSTS

TOPIC: **Must Determine Meaning of Trust Section Before Statute of Limitations Can Be Applied**
TITLE: ***Boli v. Huntington Natl. Bank*, 2022-Ohio-2127**
COURT: **Fifth Appellate District**
COUNTY: **Stark**
DATE: **June 17, 2022**

Appellant's father established a trust under which Appellant and her sister were equal beneficiaries after their parent's deaths; parents died in 1993 and 2001 and Appellant and her sister received regular distributions from the trust from 2001-2015. Appellant's sister died without any descendants so Appellant started receiving her income share. Appellant realized her sister's share was larger than what Appellant had been receiving and sued the trustee, Huntington Bank, seeking: (1) an accounting; (2) a declaration about the proper distributions of income and principal after her sister's death; and (3) to remove Huntington as Trustee. Huntington moved for summary judgment, claiming the statute of limitations to bring a claim against a Trustee was two years from the date the Trustee issues a report that discloses the issue, or four years if no report is provided; Huntington argued Appellant knew about the unequal distributions at latest in 2015 and therefore the statute of limitations expired no later than 2019; Huntington also argued that a previous issue of principal distributions was settled in 2009 and Appellant should have appealed then; trial court granted Huntington's motion for summary judgment. Appellant appealed.

Appellate court found that the trial court improperly interpreted Appellant's second cause of action as a breach of fiduciary claim when Appellant's claim was actually a claim to interpret the trust instrument and therefore the application of R.C. 5810.05 was inappropriate. The appellate court found that the trust section on principal distributions after one of the sister's deaths was ambiguous and subject to interpretation and that no court had adjudicated the meaning of the relevant trust provision; judgment reversed and remanded.

TOPIC: **Trial Court did not apply proper test in Unjust Enrichment case**
TITLE: ***Daddario v. Rose*; 2022-Ohio-3537**
COURT: **Fifth Appellate District**
COUNTY: **Stark**
DATE: **September 30, 2022**

In heirs' and administrator's action against trustee-sister alleging unjust enrichment for improper distribution of trust assets, the trial court erred in applying an incorrect test when considering whether transfers to trustee were inter vivos gifts since trustee and decedent-mother shared a fiduciary relationship, so there was a presumption of undue influence as to the assets trustee alleged were conveyed to her as gifts, and trustee was required to rebut the presumption by a preponderance of the evidence rather than by clear and convincing evidence.

TOPIC: **Trustee Breached Fiduciary Duty to Beneficiaries**
TITLE: ***In re Trust of Tary v. Seiple*; 2022-Ohio-3773**
COURT: **Sixth Appellate District**
COUNTY: **Lucas**
DATE: **October 21, 2022**

In sister's action seeking to compel trustee to provide documents and accounting of mother's trust, trial court did not err in granting sister's motion to remove trustee where trustee's conduct constituted a serious breach of trust under 5807.06(B)(1) because she breached her duty to her sister as residual beneficiary for her own benefit, and even if trustee's delay in providing accounting to sister pursuant to R.C. 5808.13(A) was reasonable, it masked the serious breach of trust regarding transfer of properties.

TOPIC: **Trustee Attempted to Transfer Trust Property to Himself**
TITLE: ***Wisehart v. Wisehart*; 2022-Ohio-3774**
COURT: **Twelfth Appellate District**
COUNTY: **Preble**
DATE: **October 24, 2022**

In quiet title and declaratory action by plaintiff-son and co-trustee of trust against defendant father and co-trustee alleging breach of fiduciary duty for attempting to transfer trust property to himself, resulting in a summary judgment to plaintiff, trial court did not err in denying defendant's Civ.R. 60(B)(5) motion "to reopen case" and to vacate the judgment where defendant's attempts to transfer property to himself or his new spouse were a legal nullity, defendant's spouse had no interest in the property held by the trust and was a nonparty. Attorney fees granted to plaintiff because defendant failed to present a reasonable question for review and therefore appeal is frivolous pursuant to R.C. 2323.51(A).

TOPIC: **Guardian of Trustee Able to Remove Successor Trustee Following Trust Provision, After Trustee Became Incompetent**
TITLE: ***In re Robert J. Pond Living Trust*; 2022-Ohio-4301**
COURT: **Fifth Appellate District**
COUNTY: **Delaware**
DATE: **December 2, 2022**

In dispute involving a family trust which provided that son would become successor trustee if his mother-trustee was unable to serve, and mother was later adjudicated incompetent, trial court did not err in allowing mother's guardian to exercise mother's rights in the trust to remove son as successor trustee where the trust document allowed guardian, on behalf of mother, to apply to the probate court to remove son as trustee, to make demands for principal and income distributions from the trust, and to exercise mother's rights in the trust, and son is not a beneficiary eligible to receive distributions because mother is the current beneficiary of the trust.

WILLS

TOPIC: **Summary judgment in a will contest is proper when no evidence is submitted to support the claim of undue influence.**
TITLE: ***Fikes v. Estate of Fikes*, 2022-Ohio-2075**
COURT: **First Appellate District**
COUNTY: **Hamilton**
DATE: **June 17, 2022**

Decedent was diagnosed with pancreatic cancer and made a will one month before his death; Decedent had four children— Joey, Josh, Kimberly, and Michelle; Joey and Josh were both incarcerated at this time and one of them owed back child support. Decedent and Decedent's brother, Gregory met with Attorney Davis to prepare Decedent's will. Attorney Davis advised Decedent and Gregory that any inheritance Decedent's sons received would be seized by the state. Decedent discussed this with Josh and told him why Decedent set up his will the way he did. Decedent's will made Gregory the executor and left the majority of his estate to Decedent's

daughters. Decedent's sons filed a will contest, alleging undue influence; trial court granted summary judgment in favor of defendants finding no evidence of undue influence; Josh appealed. Afff'd

TOPIC: **Will Contest/Undue Influence/Jury Instruction**
TITLE: ***Haddad v. Maalouf-Masek*; 2022-Ohio-4085**
COURT: **Eighth Appellate District**
COUNTY: **Cuyahoga**
DATE: **November 17, 2022**

In will contest action by plaintiff-disinherited sister against defendant-executor sister, claiming undue influence, where plaintiff challenges part of the jury instruction that was confusing with regard to the issue of undue influence, trial court's judgment in favor of defendant is affirmed since plaintiff's counsel did bring the alleged error to the court's attention, and a review of the jury instructions in their entirety reveals that the remainder of the instructions remedied any confusion that the contested instruction could have created, and immediately after the instruction was given, the trial court extensively explained undue influence.

MISCELLANEOUS

TOPIC: **Qualified Income Trust (QIT) needed when Medicaid recipient has income above threshold of $2,349/mo.**
TITLE: ***Herubin v. Ohio Dept. of Job & Family Servs*., 2022-Ohio-3243**
COURT: **Seventh Appellate District**
COUNTY: **Mahoning**
DATE: **September 14, 2022**

Joe entered a nursing home and his son Mark applied for Medicaid long-term care benefits on behalf of Joe on March 20, 2020 during the first big wave of Covid. The ODJFS office that administers Medicaid benefits provided Mark with a checklist of items to verify and things to do to ensure that Joe was eligible for Medicaid. One of those items was a requirement that Mark open a Qualified Income Trust account for Joe because his monthly income was $4,160, which was higher than Ohio's $2,349 monthly income limit to be eligible for Medicaid. The ODJFS office sent Mark a letter warning that failure to complete the checklist could result in denial of benefits, gave Mark a form for a standard QIT, and gave him 30 days to follow up.

Mark claimed that he called several banks to try to set up an appointment to open a new bank account for the QIT but was locked out because banks were not doing in-person visits during Covid. ODJFS continued working with Mark, but Joe died on July 20, 2020 and the Medicaid benefits were denied on July 30, 2020. Mark went through administrative hearings with Medicaid but lost and appealed to the common pleas court on behalf of Joe's estate, though no actual probate estate was opened at the time. Mark lost there too and he appealed.

ODJFS argued that the appeal to common pleas was defective because there was no actual estate opened and a dead person, Joe, could not file an appeal. But the trial court and the court of appeals found that the appeal was proper because Mark was the authorized representative and eventually Joe's probate estate was opened and substituted in.

Turning to the merits of Mark's appeal, the court of appeals was unpersuaded. The court of appeals pointed out that Medicaid eligibility requires having income below a certain threshold, and the QIT is a permissible method of getting income below the threshold. With no QIT, Joe's income never went below the threshold, and there was no excuse of "impossibility" for failing to set up the QIT, or at least Medicaid could properly deny benefits where the applicant's income is too high.

TOPIC: **Two Adult Caretakers Could Not Provide For Care of Incapacitated Person Due to Their Alcohol Abuse**
TITLE: ***In re Adult Protective Services of Devanan*; 2023-Ohio-121**
COURT: **Twelfth Appellate District**
COUNTY: **Warren**
DATE: **January 17, 2023**

Granting county's petition for adult protective services and placing elderly woman in a nursing home is not against the weight of evidence since the county provided clear and convincing evidence that the elderly woman is incapacitated and was abused, neglected, or exploited under R.C. 5101.682(B) where evidence showed that she needed someone to be available around the clock to help with feeding, going to the bathroom, and bathing, exemplified by the incident in which she had an appointment for dialysis but ultimately had to be assisted by first responders to get to the appointment because both her son and husband suffered from alcohol abuse and were unable to care for her.