



40th Annual Probate Practice Seminar



October 1, 2021



Trumbull County Probate Court
Judge James A. Fredericka



Robins Theatre
160 East Market Street
Warren, Ohio 44481



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40th ANNUAL PROBATE PRACTICE SEMINAR

October 1, 2021

7:30 - 8:00	Registration	
8:00 - 8:45	Probate Updates:	John T. Shorts, Magistrate Christopher J. Schiavone, Magistrate Jeffrey R. Davis, Magistrate Emily Clark Weston, Magistrate <i>Trumbull County Probate Court</i>
8:45 – 9:45	Professionalism: Reflecting on the Ideals	Supreme Court Justice Sharon L. Kennedy <i>Supreme Court of Ohio</i>
9:45 - 10:00	Refreshment Break	
10:00 -10:30	The Trials and Tribulations of Step-Parent Adoptions - One Judge’s Perspective	Hon. Albert S. Campese <i>Ashtabula County Probate Court</i>
10:30 -11:30	Civil Procedure Refresher	Bernadette Bollas Genetin, Esq., Professor of Law <i>University of Akron School of Law</i>
11:30 – 12:00	Lunch	
12:00 – 12:45	Lessons Learned, the YSU We See Tomorrow Campaign Philanthropy in America, Yesterday, Today & Tomorrow	Jim Tressel, President <i>Youngstown State University</i> Paul McFadden, President <i>Youngstown State University Foundation</i>
12:45 - 1:45	What to do When Your Client Lies Professionalism	Kimberly Vanover Riley, Esq. <i>Montgomery Jonson LLP</i>
1:45 – 2:00	Refreshment Break	
2:00 – 2:45	Current Topics in Probate Panel Discussion	Hon. Robert N. Rusu, Jr. <i>Mahoning County Probate Court</i> Hon. Thomas M. Baronzzi <i>Columbiana County Probate Court</i> Hon. Robert W. Berger <i>Retired Portage County Probate Court Judge</i>
2:45 – 3:15	Case Law Update	Hon. James A. Fredericka <i>Trumbull County Probate Court</i>

PROBATE PRACTICE TIPS and UPDATES

John T. Shorts, Chief Magistrate
Christopher J. Schiavone, Magistrate
Jeffrey R. Davis, 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

Adult Guardianships

Trusts

Veterans Assistance Program

Senior Court Assistance Program

Christopher J. Schiavone

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

Employment

Associate Attorney - Friedman & Rummell Co., LPA, April 2001 to December 2012

Partner - Friedman & Rummell Co., LPA, January 2013 - February, 2015

Magistrate - Trumbull County Probate Court, February 2015 to present

Duties

Estates Without Litigation

Land Sales

Transfers of Structured Settlements

Jeffrey R. Davis

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

Employment

Private Practice, 1994-1996

Assistant Prosecuting Attorney, Fayette County Prosecutor's Office, 1996-1998

Associate, Luper, Sheriff & Neidenthal, 1998-2000

Assistant Prosecuting Attorney/Deputy Director - Drug Unit, Franklin County Prosecutor's Office, 2000-2008

Special Assistant United States Attorney, United States Attorney's Office, Southern District of Ohio, 2006-2008

Private Practice (general practice including probate), 2008-2012

Assistant Prosecuting Attorney – Violent Crimes Unit, Mahoning County Prosecutor's Office, 2012-2014

Magistrate, Trumbull County Probate Court, 2014-Present

Duties

Wrongful Death and Litigation Estates

Change of Name

Birth Record Correction/Registration

Minor/Adult Ward Settlements

Minor Guardianships

Civil Commitment Hearings

Transfers of Structured Settlements

Emily Clark Weston

J.D. University of Akron, 2011

Employment

Law Clerk - Neuman Law Office, January to July, 2012

Private Practice Attorney, July 2012 to February 2014

Attorney/Landman - Larkspur Land Group, July 2012 to January 2014

Staff Attorney, Trumbull Co. Probate Court, February 2014 to June 2016

Magistrate - Probate Court, June 2016 to present

Duties

Civil Commitments

Release from Administration

Adoption

Civil Litigation



Ohio Revised Code Section 2717.01 Definitions.

Effective: August 17, 2021

Legislation: House Bill 7

As used in this chapter:

(A) "Application" means, as context requires, an application under section 2717.02, 2717.04, or 2717.13 of the Revised Code.

(B) "Applicant" means, as context requires, a person who makes the filing under section 2717.02 or 2717.04 of the Revised Code, or the minor on whose behalf a filing is made under section 2717.13 of the Revised Code.

(C) "Conform" means to make a person's legal name consistent in all official identity documents by correcting a misspelling, inconsistency, or other error in an official identity document.

(D) "Official identity document" means a birth record, marriage record, divorce decree, driver's license, state issued identification card, social security card with the social security number redacted, passport, or any other official government-issued document required or commonly used to verify a person's identity.

(E) "Sexually oriented offense" and "child-victim oriented offense" have the same meanings as in section 2950.01 of the Revised Code.



Ohio Revised Code

Section 2717.02 Application for change of name allowed.

Effective: August 17, 2021

Legislation: House Bill 7 - 134th General Assembly

A person desiring to change the person's name may file an application in the probate court of the county in which the person resides.



Ohio Revised Code

Section 2717.03 Contents of application for change of name.

Effective: August 17, 2021

Legislation: House Bill 7 - 134th General Assembly

Subject to sections 2717.07 and 2717.19 of the Revised Code, an application for a change of name shall set forth all of the following:

- (A) That the applicant has been a bona fide resident of the county for at least sixty days prior to the filing of the application.
 - (B) The reason for which the change of name is sought.
 - (C) The requested new name.
-



Ohio Revised Code

Section 2717.04 Application to conform legal name allowed.

Effective: August 17, 2021

Legislation: House Bill 7 - 134th General Assembly

A person desiring to conform the person's legal name on an official identity document may file an application in the probate court of the county in which the person resides.



Ohio Revised Code

Section 2717.05 Contents of application to conform legal name.

Effective: August 17, 2021

Legislation: House Bill 7 - 134th General Assembly

Subject to sections 2717.07 and 2717.19 of the Revised Code, an application to conform a legal name shall set forth all of the following:

- (A) That the applicant has been a bona fide resident of the county where the applicant is filing for at least sixty days prior to the filing of the application.
 - (B) An explanation of the misspelling, inconsistency, or other error in the name.
 - (C) A description of the correction sought to conform the name on all official identity documents.
-



Ohio Revised Code

Section 2717.06 Supporting affidavit.

Effective: August 17, 2021

Legislation: House Bill 7 - 134th General Assembly

(A) An application shall be supported by an affidavit verifying all of the following:

- (1) The applicant's residency in the county for a period of at least sixty days;
- (2) That the application is not made for the purpose of evading any creditors or other obligations;
- (3) That the applicant is not a debtor in any currently pending bankruptcy proceeding;
- (4) That all of the documentary evidence submitted under section 2717.07 of the Revised Code with the application is true, accurate, and complete;
- (5) Any other information the court may require.

(B) The affidavit supporting a legal name change application shall also verify that the applicant has not been convicted of, pleaded guilty to, or been adjudicated a delinquent child for identity fraud or does not have a duty to comply with section 2950.04 or 2950.041 of the Revised Code because the applicant was convicted of, pleaded guilty to, or was adjudicated a delinquent child for having committed a sexually oriented offense or a child-victim oriented offense.



Ohio Revised Code

Section 2717.07 Evidence of identity.

Effective: August 17, 2021

Legislation: House Bill 7 - 134th General Assembly

A probate court by local rule or order may require an applicant to submit a copy of any or all of the applicant's official identity documents or other documentary evidence relating to the applicant's identity that the court deems relevant to the application.



Ohio Revised Code Section 2717.08 Hearing.

Effective: August 17, 2021

Legislation: House Bill 7 - 134th General Assembly

The probate court may hold a hearing on an application. Except as provided in sections 2717.11 and 2717.14 of the Revised Code, if the court requires a hearing, it shall set the manner, scope, and content of the hearing notice the applicant must serve.



Ohio Revised Code

Section 2717.09 Court order.

Effective: August 17, 2021

Legislation: House Bill 7 - 134th General Assembly

Except as provided under section 2717.16 of the Revised Code, upon proof that the facts set forth in the application show reasonable and proper cause for changing the name of the applicant and, if applicable, upon proof that proper notice was served, the court may order the change of name.



Ohio Revised Code

Section 2717.10 Misspelling, inconsistency, or other error.

Effective: August 17, 2021

Legislation: House Bill 7 - 134th General Assembly

Upon proof that the facts set forth in the application show that a misspelling, inconsistency, or other error of the applicant's legal name on an official identity document exists, and that reasonable and proper cause exists for issuing an order that resolves the discrepancy and conforms the applicant's legal name, the court may issue an order to conform the name of the person.



Ohio Revised Code

Section 2717.11 Sealing records.

Effective: August 17, 2021

Legislation: House Bill 7 - 134th General Assembly

If an applicant submits to the court, along with the application, satisfactory proof that open records of the name change or conformity, or publication of the hearing notice under section 2717.08 of the Revised Code, would jeopardize the applicant's personal safety, both of the following apply:

(A) The court shall waive the hearing notice requirement.

(B) If the court orders the change of name under section 2717.09 of the Revised Code or the name conformity under section 2717.10 of the Revised Code, the court shall order the records of the proceeding to be sealed and to be opened only by order of the court for good cause shown or at the request of the applicant for any reason.



Ohio Revised Code

Section 2717.13 Application to change or conform allowed on behalf of minor.

Effective: August 17, 2021

Legislation: House Bill 7 - 134th General Assembly

An application for change of name under section 2717.02 of the Revised Code or to conform a name under section 2717.04 of the Revised Code may be made on behalf of a minor by either of the minor's parents, a legal guardian, a legal custodian, or a guardian ad litem.



Ohio Revised Code

Section 2717.14 Application on behalf of minor.

Effective: August 17, 2021

Legislation: House Bill 7 - 134th General Assembly

(A) When an application is made on behalf of a minor, in addition to the proof required under sections 2717.03 or 2717.05 of the Revised Code and, if applicable, proof of the notice given under section 2717.08 of the Revised Code, the consent of both living, legal parents of the minor shall be filed, or notice of the hearing shall be given to the parent or parents not consenting by certified mail, return receipt requested.

(B) If there is no known father of the minor, the notice shall be given to the person who the mother of the minor alleges to be the father.

(C) If no father is so alleged, or if either parent or the address of either parent is unknown, notice by publication in a newspaper of general circulation in the county at least thirty days before the hearing shall be sufficient as to the father or parent.

(D) Any additional notice required by this section may be waived in writing by any person entitled to the notice.



Ohio Revised Code

Section 2717.16 Change of name prohibited.

Effective: August 17, 2021

Legislation: House Bill 7 - 134th General Assembly

(A) The court shall not order a change of name under section 2717.09 of the Revised Code if the person applying for a change of name has a duty to comply with section 2950.04 or 2950.041 of the Revised Code because the applicant was convicted of, pleaded guilty to, or was adjudicated a delinquent child for having committed a sexually oriented offense or a child-victim oriented offense.

(B) The court shall not order a change of name under section 2717.09 of the Revised Code if the person applying for a change of name has pleaded guilty to, been convicted of, or been adjudicated a delinquent child for committing a violation of section 2913.49 of the Revised Code unless the guilty plea, conviction, or adjudication has been reversed on appeal.



Ohio Revised Code

Section 2717.18 Action to conform legal name prohibited.

Effective: August 17, 2021

Legislation: House Bill 7 - 134th General Assembly

An action to conform the legal name of a person under section 2717.04 of the Revised Code shall not be permitted in lieu of either of the following:

- (A) Correction of a birth record under section 3705.15 of the Revised Code;
 - (B) Changing a legal name to a name that is not used in any existing official identity documents.
-



Ohio Revised Code

Section 2717.19 Criminal records check.

Effective: August 17, 2021

Legislation: House Bill 7 - 134th General Assembly

(A) On receipt of an application, the probate court may order a criminal records check.

(B) Any fee required for the criminal records check shall be paid by the applicant.

**PROFESSIONALISM:
REFLECTING ON THE IDEALS**

Supreme Court Justice Sharon L. Kennedy



THE SUPREME COURT *of* OHIO



SHARON L. KENNEDY

JUSTICE
SUPREME COURT OF OHIO

On Dec. 7, 2012, Sharon L. Kennedy became the 154th justice of the Supreme Court of Ohio and the ninth female justice in the court's history.

The last day of her current term is Dec. 31, 2026.

CONTACT:

Justice Sharon L. Kennedy
Supreme Court of Ohio
65 South Front Street
Columbus, Ohio 43215-3431
Tel: 614.387.9000

In November 2020, Justice **Sharon L. Kennedy** was re-elected for the second time to a full term on the Supreme Court. Justice Kennedy first joined the court in 2012, having been elected to fill an unexpired term. She was elected to her first full term in November 2014.

Prior to her term on the Ohio Supreme Court, Justice Kennedy served at the Butler County Court of Common Pleas, Domestic Relations Division beginning in 1999. From 2005 until December 2012, Justice Kennedy served as the administrative judge of that division. During her time as administrative judge, she improved the case management system to ensure the timely resolution of cases for families and children. Working with state legislators, she championed a "common sense" family-law initiative to reduce multiple-forum litigation for Butler County families.

When Butler County faced tough economic times, Justice Kennedy organized concerned elected officials in a county-wide Budget Work Group. Seeing the need to bring private-sector financial know-how to the government, she worked to create the Advisory Committee to the Budget Work Group. Justice Kennedy served as the facilitator and led discussions between county officials and private sector leaders to analyze county finances, study and implement cost saving measures, and present business-driven fiscal policy to the county commissioners.

In 1991, after obtaining her law degree from the University of Cincinnati College of Law, Justice Kennedy ran a small business of her own as a solo practitioner. While in private practice, she served the legal needs of families, juveniles, and the less fortunate. As special counsel for Attorney General Betty D. Montgomery, Justice Kennedy fought on behalf of Ohio's taxpayers to collect monies due the State of Ohio. As a part-time magistrate in the Butler County Area Courts, Justice Kennedy presided over a wide array of civil litigation and assisted law enforcement officers and private citizens seeking the issuance of criminal warrants for arrest.

Justice Kennedy began her career in the justice system as a police officer at the Hamilton Police Department. She was assigned to a rotating shift, single-officer road patrol unit working to protect and serve the citizens of the City of Hamilton. From the routine, to the heart-pounding, to the heart-breaking, she has seen it all. During her time as an officer, Justice Kennedy also worked undercover operations, implemented crime prevention programs, and later, as a civil assistant, assisted in drafting police policy and procedure for the Accreditation Program.

Throughout her career, Justice Kennedy has served on numerous boards, developed and facilitated programs to address the needs of young people, and worked with judges across the state. As a dedicated jurist she has received multiple awards of recognition including: The AMVETS Department of Ohio 2018 Past Department Commanders' Civil Servant of the Year Award, Feb. 16, 2019; The National Society of the Sons of the American Revolution Silver Good Citizenship Medal, May 5, 2018; Leadership Ohio Community Leadership Award, 2016; The University of Cincinnati College of Law Nicholas Longworth, III Alumni Achievement Award, May 17, 2014; and Northwest High School Distinguished Alumnus Award, April 25, 2014. She also was named one of 13 professional women to watch by *The Cincinnati Enquirer*, March 17, 2013.

Other awards include: Excellence in Public Service, June 2009; Judge of the Year, 2006; Above the Fold Award, 2002; and the Furtherance of Justice Award, 2001. Justice Kennedy also was featured in *Trends in the Judiciary: Interviews with Judges Across the Globe, Volume II*, published by CRC Press in February 2015.



THE SUPREME COURT *of* OHIO

COMMISSION ON PROFESSIONALISM

PROFESSIONAL IDEALS *for* Ohio Lawyers & Judges



On the Cover:

The *Words of Justice* grace the North Reflecting Pool at the Thomas J. Moyer Ohio Judicial Center. Carved from granite, the words – *Compassion, Equity, Honesty, Honor, Integrity, Justice, Peace, Reason, Truth*, and *Wisdom* – represent the foundational ideals of the judicial branch and are a reminder of the fundamental principles of justice.

THE SUPREME COURT *of* OHIO

PROFESSIONAL IDEALS
FOR OHIO LAWYERS & JUDGES



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JUSTICES

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INTERIM ADMINISTRATIVE DIRECTOR



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INTRODUCTION

The following pages contain *A Lawyer's Creed*, *A Lawyer's Aspirational Ideals* and *A Judicial Creed*, which were adopted by the Supreme Court of Ohio upon recommendation by the Supreme Court Commission on Professionalism. These statements encapsulate the ideals of professionalism for lawyers and judges.

Included in the professionalism ideals for lawyers and judges are integrity, the achievement and maintenance of competence, a commitment to a life of service, and the quest for justice for all. Professionalism requires lawyers and judges to remain mindful that their primary obligations are to the institutions of law and the betterment of society, rather than to the interests of their clients or themselves.

Also included in these materials is the Supreme Court *Statement Regarding the Provision of pro bono Legal Services by Ohio Lawyers*, which speaks to a lawyer's obligations to ensure equal access to justice and to serve the public good.

Finally, these contents feature *Professionalism DOs & DON'Ts*, which provide guidelines for professional behavior in various contexts of legal practice. Attorneys and judges who adhere to and promote the best practices depicted in the *Professionalism DOs & DON'Ts* will elevate the level of professionalism in the practice of law.



from the
STATEMENT ON PROFESSIONALISM

. . . As professionals we need to strive to meet lofty goals and ideals in order to achieve the highest standards of a learned profession. To this end, the Court issues A Lawyer's Creed and A Lawyer's Aspirational Ideals, which have been adopted and recommended for the Court's issuance by the Supreme Court Commission on Professionalism. In so doing, it is not the Court's intention to regulate or to provide additional bases for discipline, but rather to facilitate the promotion of professionalism among Ohio's lawyers, judges and legal educators. It is the Court's hope that these individuals, their professional associations, law firms and educational institutions will utilize the creed and the aspirational ideals as guidelines for this purpose.

ISSUED BY THE SUPREME COURT OF OHIO
FEBRUARY 3, 1997

A LAWYER'S CREED

TO MY CLIENTS, I offer loyalty, confidentiality, competence, diligence and my best judgment. I shall represent you as I should want to be represented and be worthy of your trust. I shall counsel you with respect to alternative methods to resolve disputes. I shall endeavor to achieve your lawful objectives as expeditiously and economically as possible.

TO THE OPPOSING PARTIES and THEIR COUNSEL, I offer fairness, integrity and civility. I shall not knowingly make misleading or untrue statements of fact or law. I shall endeavor to consult with and cooperate with you in scheduling meetings, depositions and hearings. I shall avoid excessive and abusive discovery. I shall attempt to resolve differences and, if we fail, I shall strive to make our dispute a dignified one.

TO THE COURTS and OTHER TRIBUNALS, and TO THOSE WHO ASSIST THEM, I offer respect, candor and courtesy. Where consistent with my client's interests, I shall communicate with opposing counsel in an effort to avoid or resolve litigation. I shall attempt to agree with other counsel on a voluntary exchange of information and on a plan for discovery. I shall do honor to the search for justice.

TO MY COLLEAGUES in the practice of law, I offer concern for your reputation and well-being. I shall extend to you the same courtesy, respect, candor and dignity that I expect to be extended to me.

TO THE PROFESSION, I offer assistance in keeping it a calling in the spirit of public service, and in promoting its understanding and an appreciation for it by the public. I recognize that my actions and demeanor reflect upon our system of justice and our profession, and I shall conduct myself accordingly.

TO THE PUBLIC and our SYSTEM OF JUSTICE, I offer service. I shall devote some of my time and skills to community, governmental and other activities that promote the common good. I shall strive to improve the law and our legal system and to make the law and our legal system available to all.

A LAWYER'S ASPIRATIONAL IDEALS

AS TO CLIENTS, I shall aspire:

- a) To expeditious and economical achievement of all client objectives.
- b) To fully informed client decision-making. I should:
 - 1) Counsel clients about all forms of dispute resolution
 - 2) Counsel clients about the value of cooperation as a means toward the productive resolution of disputes
 - 3) Maintain the sympathetic detachment that permits objective and independent advice to clients
 - 4) Communicate promptly and clearly with clients, and
 - 5) Reach clear agreements with clients concerning the nature of the representation.
- c) To fair and equitable fee agreements. I should:
 - 1) Discuss alternative methods of charging fees with all clients
 - 2) Offer fee arrangements that reflect the true value of the services rendered
 - 3) Reach agreements respecting fees with clients as early in the relationship as possible
 - 4) Determine the amount of fees by consideration of many factors and not just time spent, and
 - 5) Provide written agreements as to all fee arrangements.
- d) To comply with the obligations of confidentiality and the avoidance of conflicting loyalties in a manner designed to achieve fidelity to clients.
- e) To achieve and maintain a high level of competence in my field or fields of practice.

AS TO OPPOSING PARTIES and THEIR COUNSEL,
I shall aspire:

- a) To cooperate with opposing counsel in a manner consistent with the competent representation of my client. I should:
 - 1) Notify opposing counsel in a timely fashion of any canceled appearance

- 2) Grant reasonable requests for extensions or scheduling changes, and
 - 3) Consult with opposing counsel in the scheduling of appearances, meetings and depositions.
- b) To treat opposing counsel in a manner consistent with his or her professional obligations and consistent with the dignity of the search for justice. I should:
- 1) Not serve motions or pleadings in such a manner or at such a time as to preclude opportunity for a competent response
 - 2) Be courteous and civil in all communications
 - 3) Respond promptly to all requests by opposing counsel
 - 4) Avoid rudeness and other acts of disrespect in all meetings, including depositions and negotiations
 - 5) Prepare documents that accurately reflect the agreement of all parties, and
 - 6) Clearly identify all changes made in documents submitted by opposing counsel for review.

AS TO THE COURTS and OTHER TRIBUNALS, and TO THOSE WHO ASSIST THEM, I shall aspire:

- a) To represent my clients in a manner consistent with the proper functioning of a fair, efficient and humane system of justice. I should:
- 1) Avoid nonessential litigation and nonessential pleading in litigation
 - 2) Explore the possibilities of settlement of all litigated matters
 - 3) Seek noncoerced agreement between the parties on procedural and discovery matters
 - 4) Avoid all delays not dictated by competent representation of a client
 - 5) Prevent misuses of court time by verifying the availability of key participants for scheduled appearances before the court and by being punctual, and
 - 6) Advise clients about the obligations of civility, courtesy, fairness, cooperation and other proper behavior expected of those who use our system of justice.

b) To model for others the respect due to our courts.

I should:

- 1) Act with complete honesty
- 2) Know court rules and procedures
- 3) Give appropriate deference to court rulings
- 4) Avoid undue familiarity with members of the judiciary
- 5) Avoid unfounded, unsubstantiated, or unjustified public criticism of members of the judiciary
- 6) Show respect by attire and demeanor
- 7) Assist the judiciary in determining the applicable law, and
- 8) Give recognition to the judiciary's obligations of informed and impartial decision-making.

AS TO MY COLLEAGUES IN THE PRACTICE OF LAW, I shall aspire:

- a) To recognize and develop a professional interdependence for the benefit of our clients and the legal system
- b) To defend you against unjust criticism, and
- c) To offer you assistance with your personal and professional needs.

AS TO OUR PROFESSION, I shall aspire:

a) To improve the practice of law. I should:

- 1) Assist in continuing legal education efforts
- 2) Assist in organized bar activities
- 3) Assist law schools in the education of our future lawyers, and
- 4) Assist the judiciary in achieving objectives of *A Lawyer's Creed* and these aspirational ideals.

b) To promote the understanding of and an appreciation for our profession by the public.

I should:

- 1) Use appropriate opportunities, publicly and privately, to comment upon the roles of lawyers in society and government, as well as in our system of justice, and

- 2) Conduct myself always with an awareness that my actions and demeanor reflect upon our profession.
- c) To devote some of my time and skills to community, governmental and other activities that promote the common good.

AS TO THE PUBLIC and OUR SYSTEM OF JUSTICE,
I shall aspire:

- a) To consider the effect of my conduct on the image of our system of justice, including the effect of advertising methods.
- b) To help provide the pro bono representation that is necessary to make our system of justice available to all.
- c) To support organizations that provide pro bono representation to indigent clients.
- d) To promote equality for all persons.
- e) To improve our laws and legal system, by for example:
 - 1) Serving as a public official
 - 2) Assisting in the education of the public concerning our laws and the legal system
 - 3) Commenting publicly upon our laws
 - 4) Using other appropriate methods of effecting positive change in our laws and the legal system.

STATEMENT REGARDING THE PROVISION OF PRO BONO LEGAL SERVICES BY OHIO LAWYERS

Each day, Ohioans require legal assistance to secure basic needs such as housing, education, employment, health care, and personal and family safety. Many persons of limited means are unable to afford such assistance, and legal aid programs must concentrate limited resources on those matters where the needs are most critical. The result is that many Ohioans who are facing significant legal problems do not have access to affordable legal services. These persons are forced to confront landlord-tenant issues, have questions involving employment rights, or seek protection against domestic violence without the assistance of a legal advocate.

In 1997, this Court issued a *Statement on Professionalism* that recognizes each lawyer's obligation to engage in activities that promote the common good, including the provision of and support for pro bono representation to indigent clients. In 2007, in the *Preamble to the Ohio Rules of Professional Conduct*, the Court reemphasized the importance of this obligation by stating:

A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for those who because of economic or social barriers cannot afford or secure legal counsel.

Lawyers, law firms, bar associations, and legal services organizations, such as the Ohio Legal Assistance Foundation, have done and continue to do much to address unmet civil legal needs through the organization of, support for, and participation in pro bono legal services programs. Although these programs have increased both in number and scope in recent years, there remains an urgent need for more pro bono services.

This Court strongly encourages each Ohio lawyer to ensure access to justice for all Ohioans by participating in pro bono activities. There are pro bono programs available throughout Ohio that are sponsored by bar associations, legal aid programs, churches and civic associations. Many programs offer a variety of free legal services, while others concentrate on specific legal needs. Lawyers also may choose to participate in programs that focus on the needs of specific individuals such as senior citizens, the disabled, families of military personnel or immigrants.

The website, www.ohiolegalaids.org/pro-bono, contains a complete, searchable listing of pro bono programs and opportunities in Ohio. A lawyer may fulfill this professional commitment by providing legal counsel to charitable organizations that may not be able to afford to pay for legal services or by making a financial contribution to an organization that provides legal services to persons of limited means.

The Court recognizes that many Ohio lawyers honor their professional commitment by regularly providing pro bono legal services or financial support to pro bono programs. Moreover, the Court encourages lawyers to respond to this call by seeking to engage in new or additional pro bono opportunities. To

document the efforts and commitment of the legal profession to ensure equal access to justice, the Court, in conjunction with the Ohio Legal Assistance Foundation, will develop a means by which Ohio lawyers may report voluntarily and anonymously their pro bono activities and financial support for legal aid programs. The information regarding pro bono efforts will not only underscore the commitment of the legal profession to serving the public good but also will serve as a constant reminder to the bar of the importance of pro bono service.

*This Court strongly
encourages each Ohio lawyer
to ensure access to justice
for all Ohioans ...*

ISSUED BY THE SUPREME COURT OF OHIO
SEPTEMBER 20, 2007

Visit www.ohioprobono.org for more information.

from the
STATEMENT ON JUDICIAL PROFESSIONALISM

. . . In recognition of the unique standards of professionalism required of a judge or a lawyer acting in a judicial capacity, the Court issues A Judicial Creed upon the recommendation of the Supreme Court Commission on Professionalism. It is the Court's goal by adopting this creed to remind every judge and every lawyer acting in a judicial capacity of the high standards expected of each by the public whom they serve.

ISSUED BY THE SUPREME COURT OF OHIO
JULY 9, 2001

A JUDICIAL CREED

For the purpose of publicly stating my beliefs, convictions and aspirations as a member of the judiciary or as a lawyer acting in a judicial capacity in the state of Ohio:

I RE-AFFIRM my oath of office and acknowledge my obligations under the Canons of Judicial Ethics.

I RECOGNIZE my role as a guardian of our system of jurisprudence dedicated to equal justice under law for all persons.

I BELIEVE that my role requires scholarship, diligence, personal integrity and a dedication to the attainment of justice.

I KNOW that I must not only be fair but also give the appearance of being fair.

I RECOGNIZE that the dignity of my office requires the highest level of judicial demeanor.

I WILL treat all persons, including litigants, lawyers, witnesses, jurors, judicial colleagues and court staff with dignity and courtesy and insist that others do likewise.

I WILL strive to conduct my judicial responsibilities and obligations in a timely manner and will be respectful of others' time and schedules.

I WILL aspire every day to make the court I serve a model of justice and truth.





PROFESSIONALISM
DOs & DON'Ts:

JUDICIAL
PROFESSIONALISM

JUDICIAL PROFESSIONALISM

As the guardians of our legal system, judges are expected to establish and maintain the highest level of professionalism. The way in which judges manage their dockets, interact with counsel, and preside over their courtrooms sets a standard of professionalism for the attorneys who appear before them. Just as significantly, the words and actions of judges also shape the public's perception of the justice system. Being a judge requires diligence, personal integrity, and a dedication to the attainment of justice. With these principles in mind, the Supreme Court of Ohio Commission on Professionalism prepared this list of "DOs and DON'Ts" to guide judges in carrying out their responsibilities. In creating this list, the commission does not intend to regulate or to provide additional bases for discipline, but rather to help promote professionalism among Ohio's judges. The commission encourages all judges to employ these practices in their daily routines, and in so doing, make lawyers and litigants feel welcome in their courtrooms and assured that disputes will be resolved in an efficient, timely, and just manner.

DO *in* PRETRIAL MATTERS

- Do provide litigants, in advance of an initial pretrial hearing or case management conference, notice of specific procedures that you wish counsel to follow that may differ from those followed in other courtrooms (e.g., regarding voir dire, jury instructions, note taking by or questions from jurors, etc.).
- Do use a case management order with all pertinent deadlines for each case, including specific dates for the completion of fact and expert discovery and the filing of certain motions.
- Do be accessible to parties to resolve discovery disputes, either by telephone conference or court hearing.
- Do remember that counsels' awareness of your accessibility may have the effect of decreasing a need for your actual involvement or the likelihood of counsel filing motions to compel discovery.
- Do conduct final pretrial conferences yourself to the extent possible. If a conflict in your schedule arises, allow parties the opportunity to reschedule before delegating the responsibility to a staff attorney. Remember that the presence of the judge at the final pretrial conference often helps facilitate a settlement.

DO *in* SCHEDULING

- Do freely grant a motion to extend case deadlines if the extension will not adversely affect any date previously set or will not otherwise prejudice a party.
- Do be aware of attorneys' professional and personal schedules (including vacation time) before setting a court date or denying a timely motion for continuance.
- Do perform a proper triage in managing scheduling conflicts between cases.
- Do weigh the consequences, cost, and additional expenditure of time and resources that are likely to result from cancelling one proceeding and moving forward on another.
- Do tell attorneys that if they want to put something on the record, they will be permitted to do so, subject to the court's determination as to the appropriate time, place, and manner.
- Do treat parties, litigants, and others with respect and dignity and create an environment where all persons are treated fairly and believe that they have been fully heard.
- Do instruct the members of your staff to treat all court visitors with the same respect that they themselves would expect.
- Do be patient and temperate, especially under trying circumstances.

DO *in* CONDUCTING HEARINGS & TRIALS

- Do enforce standards in your courtroom consistent with *Professionalism DOs and DON'Ts: Professionalism in the Courtroom* and encourage attorneys to follow the other publications of the Supreme Court of Ohio Commission on Professionalism.
- Do take the bench promptly and begin hearings at the scheduled time. Alert parties of any delay or conflict with as much advance notice as possible.
- Do consider making reasonable accommodations for self-represented litigants, such as summarizing the nature of the proceedings and the presentation and admission of evidence, using commonly understood words, instead of legal jargon, briefly explaining the reasoning for rulings, and, where appropriate, referring them to available resources that may assist them.
- Do address all participants formally and consistently in court by using an appropriate title, such as Ms., Mr., Mrs., Counsel, Dr., Rev., etc.
- Do be aware of your mood and take necessary breaks to decompress so that you can render the next decision refreshed.
- Do make decisions after the conclusion of a bench trial in such a manner as will make the litigants feel that their arguments were fully considered.
- Do deliver the decision or sentence in a formal, dignified, and neutral tone.

in RULING ON MOTIONS

DO

- Do prepare for motion hearings by reading all relevant memoranda of law in advance of the hearing.
- Do listen to and consider each party's position, and provide all parties with adequate opportunities to respond, before ruling.
- Do issue timely rulings once motions become ripe, remembering the collateral expense incurred, as well as the frustration attorneys and parties experience, when rulings are not made in a timely manner.
- Do what you believe to be the right thing and trust that, if it turns out that your ruling was wrong, the error will, in all likelihood, be corrected on review.

in OTHER ACTIVITIES

DO

- Do bring to a lawyer's attention any instance of the lawyer exhibiting a lack of civility or professionalism.
- Do encourage lawyers to engage in pro bono service.
- Do consider providing law students the opportunity to intern or extern in your court, as well as participating in mentoring programs that guide new lawyers in their transition into practice.
- Do accept criticism, justified or unjustified, even though you may not, or should not, respond.
- Do remember that the public or private functions you attend may affect confidence in the judiciary.
- Do consider teaching at bar association and judicial association CLE functions, mock trials, the Law and Leadership Institute, classroom visits, and other educational activities.
- Do bear in mind that dialogue between the bench and bar promotes a strong legal community and a more effective judicial system and so participate actively in the activities and committees of your state and local bar associations, judicial conferences, and judicial associations.

DON'T

- Don't hold attorneys or litigants accountable for events beyond their control.
- Don't chastise, correct, or question attorneys in a demeaning manner, especially in front of their clients or the jury.
- Don't take an overly familiar tone with any lawyer, litigant, or witness while in court and on the record. Recognize how your interactions may be perceived by adverse counsel, by parties, by jurors, or by spectators.
- Don't threaten or disclose how you are leaning on a dispositive motion as a means of forcing a settlement.
- Don't use the contempt power lightly.
- Don't conduct a hearing, sentence a defendant, or render an important decision in a state of anger or depression.
- Don't demean or mock a defendant at a criminal sentencing hearing or in any written opinion.
- Don't permit profanity and expressions of vengeance from attorneys, victims, or witnesses to invade a formal sentencing proceeding.
- Don't hesitate to ask for post-hearing briefs or proposed findings of fact or conclusions of law if you believe that these post-hearing submittals will be helpful or appropriate.
- Don't be worried about whether you will be appealed or what a reviewing court may say.
- Don't disparage any attorney or fellow judge in your private conversations.
- Don't attend an event if your attendance could cause a reasonable person to question your later impartiality in a pending case.



PROFESSIONALISM
DOs & DON'Ts:

WORKING WITH
OPPOSING
COUNSEL
& OTHER LAWYERS

WORKING WITH OPPOSING COUNSEL & OTHER LAWYERS

Under “A Lawyer’s Creed” issued by the Supreme Court of Ohio in February 1997, Ohio lawyers pledge to offer fairness, integrity, and civility to opposing parties and their counsel. The Supreme Court of Ohio Commission on Professionalism prepared this list of “DOs and DON’Ts” to illustrate some of the ways lawyers can fulfill this pledge in their everyday communication with opposing counsel and other lawyers. In creating this list, it is not the commission’s intention to regulate or to provide additional bases for discipline, but rather to facilitate the promotion of professionalism among Ohio’s lawyers. By following these practices, lawyers will elevate the level of professionalism in their day-to-day interactions with other lawyers.

DO

- Do maintain a courteous and cooperative working relationship with opposing counsel and other lawyers.
- Do avoid motions about minor issues that should be worked out informally.
- Do wait 24 hours before deciding to respond to an intemperate, untrue, or exasperating communication from another attorney.
- Do discuss discovery disputes with opposing counsel in person, by phone, or by email before sending a formal letter that stakes out your position.
- Do consult in advance with other attorneys to avoid scheduling conflicts.
- Do cooperate with other attorneys when you have obtained permission of the court to extend deadlines imposed by a court order.
- Do extend professional courtesies regarding procedural formalities and scheduling when your client will not suffer prejudice, DO be fair-minded with respect to requests for stipulations, and DO agree to stipulate to facts that are not in dispute if they will not adversely affect your client
- Do respond in a timely fashion to communications from opposing counsel and other attorneys.
- Do keep your word.
- Do identify the changes you made from previous drafts when exchanging document drafts.
- Do promptly notify other counsel (and, where appropriate, the court or other persons who are affected) when hearings, depositions, meetings, or conferences must be cancelled or postponed.
- Do conclude a matter with a handshake or an exchange of courteous messages.
- Do require that persons under your supervision conduct themselves with courtesy and civility and that they adhere to these precepts when dealing with other attorneys and their staffs

DON'T

- Don't respond in kind when confronted with unprofessional behavior by another attorney.
- Don't serve papers at a time or in a manner intended to inconvenience or take advantage of opposing counsel, such as late on a Friday afternoon, on the day preceding a holiday, or when you know counsel is absent or ill.
- Don't be belligerent, insulting, or demeaning in your communications with other attorneys or their staff
- Don't use discovery as a means of harassment.
- Don't publicly disparage another attorney, either during or after a case concludes.



PROFESSIONALISM
DOs & DON'Ts:

LEGAL WRITING

LEGAL WRITING

A substantial part of the practice of most lawyers is conducted through the written word. Lawyers communicate with other attorneys, courts, and clients through writing. Writings introduce judges to the facts of a case, state the applicable law, and argue for a desired action or resolution to a legal dispute. The most effective legal writing is well-researched, clearly organized, logically sound, and professional in tone and appearance.

The Supreme Court of Ohio Commission on Professionalism has prepared this list of “DOs and DON’Ts” to guide lawyers in their professional writing. These points relate to many facets of attorney writing. In creating this list, the commission does not intend to regulate or to provide additional bases for discipline, but rather to help promote professionalism among Ohio’s lawyers. The list provides general categories of “DOs and DON’Ts” containing specific recommendations on form and content for specific types of writing.

DO

- **DO MAINTAIN PROPER FOCUS**
 - Do keep your purpose in mind while writing.
 - Do tailor your writing to your primary audience, but be aware that others may read what you have written.
- **DO PRESENT AN HONEST, ACCURATE POSITION**
 - Do include all relevant facts.
 - Do cite the record accurately.
 - Do disclose relevant authority, including adverse controlling authority.
 - Do update all cited authorities and exclude any reversed or overruled case.
- **DO PROVIDE A CONSISTENT, COHERENT ARGUMENT**
 - Do research the applicable law thoroughly.
 - Do investigate the facts diligently.
 - Do plan and organize your writing.
 - Do make sure that any legal theory you present is consistent with applicable law.
 - Do use persuasive authority.
 - Do state clearly what you are requesting in motions and briefs.
- **DO ADOPT A CLEAR & PERSUASIVE STYLE**
 - Do put material facts in context.
 - Do write in a professional and dignified manner.
 - Do put citations at the end of a sentence.
 - Do use pinpoint citations when they would be helpful.

DO

- DO PROVIDE APPROPRIATE SIGNPOSTS
 - Do consider using headings and summaries.
 - Do use transitions between sections that guide the reader from one argument to the next, especially in longer pieces of writing.
- DO USE PRECISE ENGLISH GRAMMAR & CITATION FORM
 - Do proofread for spelling and grammar.
- Do edit and redraft.
- Do cite cases and authorities accurately.
- Do use Ohio citation form (See *Supreme Court of Ohio Writing Manual*¹).
- Do adhere to the applicable court's technical requirements and rules for submitting documents, such as, for example, any restrictions on fonts, margins, and document length.

DON'T

- DON'T MAKE YOUR READER'S JOB MORE DIFFICULT
 - Don't use jargon or confusing acronyms.
 - Don't use boilerplate without tailoring to your specific argument or case.
 - Don't use string citations, unless parenthetical explanations follow.
 - Don't use lengthy quotations. Break up quoted language as necessary to simplify points.
 - Don't put important information in footnotes.
 - Don't overuse nominalizations, i.e., noun forms of verbs (e.g., "indication" instead of "indicate").
 - Don't overuse the passive voice.
- DON'T MAKE INAPPROPRIATE COMMENTS
 - Don't make ad hominem attacks.
 - Don't use hyperbole and sarcasm.
 - Don't use overly emotional arguments. Rely on logic and reason.
- DON'T MISCHARACTERIZE YOUR POSITION
 - Don't misrepresent.
 - Don't misquote.
 - Don't rely on non-record facts.
 - Don't plagiarize.
 - Don't lie.

¹See sc.ohio.gov/ROD/manual.pdf.



PROFESSIONALISM
DOs & DON'Ts:

CONDUCT
OF PROSECUTORS
& DEFENSE
ATTORNEYS

CONDUCT OF PROSECUTORS & DEFENSE ATTORNEYS

The integrity of our criminal justice system depends, in large part, upon the professionalism of the lawyers who prosecute criminal matters on behalf of the state and the defense attorneys who defend the accused. In a criminal matter, the rights of the victim, the protection of the public, and the liberty of the defendant are at stake. Considering the importance of these interests, perhaps nowhere in the practice of law is it more important for attorneys to act with professionalism and to serve our system of justice honorably. The Supreme Court of Ohio Commission on Professionalism, with the assistance of members of the Ohio Prosecuting Attorneys Association and the Ohio Association of Criminal Defense Lawyers, prepared this list of “DOs and DON’Ts” to guide attorneys who practice criminal law. In creating this list, the commission does not intend to regulate or provide additional bases for discipline, but rather to help promote professionalism among Ohio’s lawyers.

for PROSECUTORS DO

- Do remember your job is not to “win,” but to help administer justice.
- Do go forward with a case only if you have a good-faith belief in the guilt of the defendant.
- Do remember that the power of the state is not personal to an individual prosecutor and that you should always use prosecutorial power judiciously, with personal humility.
- Do remain in control of your case and remember that you – not the police, not the investigator, and not the victim – are the person in charge, that your client is the government, and that your ultimate goal is the furtherance of justice.
- Do periodically and regularly review your case from the point of view of the defense. This practice will help you provide exculpatory evidence in a timely fashion.
- Do be realistic about the strengths and weaknesses of your case as it evolves and circumstances change. Be willing to adjust your position as justice requires.
- Do take any doubts about the sufficiency of the evidence supporting the government’s case to your supervisor, and document the fact that you took that step.
- Do provide discovery in a timely manner. Have discovery materials ready within a reasonable period of time after request, and promptly inform defense counsel of delays.
- Do respond to communications from the victim and his or her family. Be attentive to their concerns and be mindful that they may not be familiar with court procedures or proceedings.

for PROSECUTORS DON'T

- Don't forget that your role is the obtainment of justice, which does not always mean a conviction.
- Don't pursue a charge if the evidence is not there.
- Don't be rude to defense counsel, who is simply advocating for his or her client.
- Don't be vindictive or punitive to defendants who are exercising their rights. The mere filing of a motion to suppress, a request for search warrant affidavits, a discovery demand, or the exercise of a defendant's right to trial does not justify adding additional and unnecessary charges or recommending a harsher sentence.

for DEFENSE ATTORNEYS DO

- Do advocate for your client, listen to your client, and treat your client with respect.
- Do advocate creatively, but reasonably. Remember that your credibility will affect this client and all of your clients, present and future.
- Do determine the type of fee agreement that is best for your client, i.e., hourly or flat fee. Do enter into a written fee agreement with your client as early as feasible.
- Do explain to your client, as early as feasible, your dual role as an adviser and as defender.
- Do respond to communications from the defendant's family, as long as the information sought is not protected by the attorney-client privilege. Be attentive to their concerns and be mindful that they may not be familiar with court procedures or proceedings.
- Do meet with your client regularly throughout the representation.
- Do contact the prosecutor with questions or concerns about discovery before filing a motion to compel or a motion for a continuance.
- Do promptly file a notice of appearance when taking over a case as retained counsel from appointed counsel, so that appointed counsel can file a motion to withdraw, and ask appointed counsel to provide you with all pleadings and all discovery materials and other case information he or she obtained.
- Do prepare accordingly when appearing in a court in which you haven't appeared before. Check the court's website, or with the court staff, and, if necessary, the judge, in order to familiarize yourself with local rules and the general practices of that court.

for DEFENSE ATTORNEYS

DON'T

- Don't suggest to your client that you can get a certain result or make promises to your client that you may not be able to keep.
- Don't represent that you have not received discovery materials from the prosecutor when such materials have been made available to you, or represent that you have not received a particular document when you have not asked the prosecutor for it.
- Don't file motions that are frivolous, or file certain motions only because you believe that such motions are usually filed, or file last-minute motions with respect to matters about which you have long been aware.
- Don't demean your client in conversations with the prosecutor and/or the judge.
- Don't enter a plea agreement on your client's behalf without first investigating all areas of potential defense.
- Don't ask for more time than is needed when requesting a continuance.
- Don't request last-minute continuances as a trial tactic, especially in cases where witnesses have to travel.

for PROSECUTORS & DEFENSE ATTORNEYS

DO

- Do review and consistently follow the Supreme Court of Ohio's *Professionalism Dos and Don'ts* concerning *Professionalism in the Courtroom and Working with Opposing Counsel and Other Attorneys*.
- Do be respectful of the time and resources of opposing counsel. Where discrepancies in resources exist, be reasonable.
- Do prepare clients, witnesses, family, and friends for the courtroom by explaining the rules and procedures of court to them.
- Do use third parties when possible to interview witnesses. If you must personally interview a witness, especially a witness who is likely to be called to testify for the opposing side, have a third person present during the interview to avoid the possibility of your having to testify at trial as to what the interviewee actually said.
- Do know and follow the rules of evidence and rules of procedure.
- Do treat opposing counsel with the utmost professionalism, even if you disagree.

for PROSECUTORS & DEFENSE ATTORNEYS

DON'T

- Don't make statements to the court or the media concerning the strength of your case prior to evaluating discovery materials.
- Don't disparage or personally attack opposing counsel. Don't claim a prosecutor is "persecuting" your client. Don't treat a defense attorney as if he or she committed the alleged crime. Don't consider opposing counsel an enemy when opposing counsel is simply doing his or her respective job.
- Don't improperly suggest a judge or opposing counsel has a political agenda or bias. Think carefully about how such statements may affect a client, a victim, or the public's perception of the quality of justice.
- Don't refer to your own personal, political, or religious beliefs during a criminal proceeding.
- Don't misrepresent your status by telling a witness that you "work with the court so you have to talk to me," allow your investigator to make such a representation, or discourage a witness from talking to opposing counsel.
- Don't have ex parte communications with the judge about substantive issues or the merits of a case.
- Don't use inappropriate body language to try to persuade a jury. Examples include: fist pumping after a favorable ruling from the judge, rolling eyes during a defendant's or witness's testimony, uttering audible sighs, putting your head down on a table, nodding your head in agreement, or shaking your head in disagreement during court proceedings.
- Don't feign ignorance of rules of courts, rulings made by the judge, or of evidence that was disclosed to you. For example, during a trial or hearing, don't refer to evidence that has been excluded in limine or make comments about, or allude in questions to, evidence already held to be inadmissible.
- Don't hide evidence or fail to disclose witnesses. Don't wait until the morning of trial to disclose witnesses or evidence.
- Don't make unfair or derogatory references to opposing counsel during opening and closing statements. Trials are about facts and the arguments that fit them. Avoid any arguments or characterizations of opposing counsel's case that are not based on the evidence.

PROSECUTORS & DEFENSE ATTORNEYS *are officers of the court and responsible for the administration of justice. Keeping this in mind, they must proceed at all times with the diligence, integrity, and courtesy such an important endeavor requires.*



PROFESSIONALISM
DOs & DON'Ts:

DEPOSITIONS

DEPOSITIONS

If there is one area of the practice of law that consistently gives rise to an inordinate number of complaints about lack of professionalism, it is the area of depositions. Depositions, of course, are an extremely important and valuable component of our adversary system, but, if abused and mishandled, they can engender unnecessary and costly strife that impedes and undercuts the entire process. To help correct this situation, the Commission on Professionalism is publishing the following guidelines, a set of deposition “DOs and DON’Ts.” The commission believes that if lawyers follow these guidelines — which are consistent with, and to some extent provide specific amplification of, the Supreme Court’s Statements on Professionalism — lawyers will be able to use depositions to advance the legitimate interests of their clients, while, at the same time, treating all participants in the process, including deponents and opposing counsel, with courtesy, civility, and respect. It is not the commission’s intention to regulate or to suggest additional bases for discipline, but rather to facilitate the promotion of professionalism among Ohio’s lawyers. In short, by adhering to these guidelines, lawyers will be acting as professionals and in the manner that the courts expect.

Therefore, as a lawyer who is scheduling, conducting or attending a deposition:

DO

- Do review the local rules of the jurisdiction where you are practicing before you begin.
- Do cooperate on scheduling. Rather than unilaterally sending out a notice of deposition, call opposing counsel first and cooperate on the selection of the date, time, and place. Then send out a notice reflecting the agreed upon date.
- If, after a deposition has been scheduled, a postponement is requested by the other side, do cooperate in the rescheduling unless the requested postponement would be one of those rare instances that would adversely affect your client’s rights.
- Do arrive on time.
- Do be prepared, including having multiple copies of all pertinent documents available in the deposition room, so that the deposition can proceed efficiently and expeditiously.
- Do turn off all electronic devices for receiving calls and messages while the deposition is in progress.
- Do attempt to agree, either before or during the deposition, to a reasonable time limit for the deposition.
- Do treat other counsel and the deponent with courtesy and civility.
- Do go “off record” and confer with opposing counsel, privately and outside the deposition room, if you are having problems with respect to objections, the tone of the questions being asked or the form of the questions.
- Do recess the deposition and call the court for guidance if your off-the-record conversations with opposing counsel are not successful in resolving the “problem.”

DO

- If a witness is shown a document, do make sure that you have ample copies to distribute simultaneously to all counsel who are present.
- If a deponent asks to see a document upon which questions are being asked, do provide a copy to the deponent.
- Do inform your client in advance of the deposition (if the client plans to attend) that you will be conducting yourself at the deposition in accordance with these “dos and don’ts.”

DON'T

- Don’t attempt to “beat your opponent to the punch” by scheduling a deposition for a date earlier than the date requested by your opponent for deposition(s) that he or she wants to take.
- Don’t coach the deponent during the deposition when he or she is being questioned by the other side.
- Don’t make speaking objections to questions or make statements that are intended to coach the deponent. Simply say “object” or “objection.”
- Don’t make rude and degrading comments to, or ad hominem attacks on, deponent or opposing counsel, either when asking questions or objecting to questions.
- Don’t instruct a witness to refuse to answer a question unless the testimony sought is deemed by you to be privileged, work product, or self-incriminating, or if you believe the examination is being conducted in a manner as to unreasonably annoy or embarrass the deponent.
- Don’t take depositions for the purpose of harassing a witness or in order to burden an opponent with increased litigation expenses.
- Don’t overtly or covertly provide answers to questions asked of the witness.
- Don’t demand conferences or breaks while a question is pending, unless the purpose is to determine whether a privilege should be asserted.
- Don’t engage in conduct that would be inappropriate in the presence of a judge.



PROFESSIONALISM
DOs & DON'Ts:

PROFESSIONALISM
IN THE COURTROOM

PROFESSIONALISM IN THE COURTROOM

To be truly professional when appearing in court, a lawyer must act in a proper manner. Such conduct goes beyond complying with the specific rules of procedure and of evidence promulgated by the Supreme Court of Ohio and with local rules issued by trial courts and individual judges. Proper conduct in the courtroom also includes adhering to common principles of civility and respect when dealing with the judge, court staff, and opposing counsel. The Supreme Court of Ohio Commission on Professionalism has prepared this list of “DOs and DON’Ts,” to illustrate a number of principles so that lawyers appearing in Ohio courts will fully understand what is expected of them. In creating this list, the commission does not intend to regulate or to provide additional bases for discipline, but rather to help promote professionalism among Ohio’s lawyers.

By following the principles of civility and respect, lawyers will enhance their professionalism, as well as the dignity of courtroom proceedings.

DO

- Do be prepared for your participation in any court conference or proceeding.
- Do wear appropriate courtroom attire when appearing in court. If you are a male attorney, always wear a tie.
- Do advise your clients on how to dress appropriately for any scheduled court appearance.
- Do be on time for all court conferences and proceedings. (The best practice is to arrive at least five minutes in advance of the scheduled time.)
- If you are going to be late, do call the courtroom so those who are waiting are properly informed.
- Do turn your cell phone and all other electronic devices off or to silent mode before entering a courtroom.
- Do be courteous when addressing the judge and opposing counsel, both in the courtroom and in chambers.
- Do begin any argument on the record before the judge or jury, by saying, “May it please the court.”
- Do stand whenever you address the judge in the courtroom.
- Do show all exhibits to opposing counsel before showing the exhibit to a witness.
- Do ask the judge’s permission before approaching a witness during trial or before publishing an exhibit to the jury during an examination.
- Do speak clearly and enunciate when addressing the judge or a witness.
- Do agree to stipulate to facts that are not in dispute if they will not adversely affect your client.
- Do respect the private nature of a sidebar conference; avoid making statements or arguments at a level that may be overheard by the jury.
- Do inform the judge in advance of any delays in the scheduling of witnesses.

DO

- Do treat court personnel with the same respect you would show the judge.
- Do be accurate when setting forth pertinent facts and pertinent rules of law.
- Do answer questions from the judge directly and forthrightly.
- Do bring to the judge's attention any possible ethics issues as soon as you become aware of them.
- Do verify immediately the availability of necessary participants and witnesses after a date for a hearing or trial has been set, so you can promptly notify the judge of any problems.
- During final argument, do be circumspect when summarizing testimony that contains profane words.

DON'T

- Don't make ad hominem attacks on opposing counsel or be sarcastic in either your oral arguments or written briefs.
- Don't shout when making an objection in a court proceeding.
- Don't make any speaking objections in a jury case except for an explanatory single word or two (e.g., "hearsay," "leading," "no foundation"). DO request a side bar conference if you must expound on your objections.
- Don't interrupt opposing counsel or the judge, no matter how strongly you disagree with what is being said.
- Don't argue with the judge or react negatively after the judge has ruled on an objection or other matter.
- Don't tell the judge that he or she has committed a reversible error.
- Don't tell the judge that another judge has ruled a different way without providing a copy of the other judge's written opinion.
- Don't display anger in the courtroom.
- Don't make facial objections during testimony or during arguments by opposing counsel.
- Don't bring a beverage to the trial table unless it is in a non-descript glass or cup and only if you determined that the judge does not object to a beverage on the trial table.
- Don't lean or sit on the trial table, jury box, or any other furniture in the courtroom.
- Don't move freely around the courtroom once a proceeding is underway without obtaining permission from the judge.
- Don't celebrate or denounce a verdict as it is delivered, and also advise clients and interested spectators not to do so. DO behave civilly with opposing counsel when leaving the courtroom.



THE SUPREME COURT OF OHIO COMMISSION ON PROFESSIONALISM

The Supreme Court of Ohio created the Commission on Professionalism in September 1992. As stated in Gov.Bar R. XV, the commission's purpose is to promote professionalism among attorneys admitted to the practice of law in Ohio. The commission aspires to advance the highest standards of integrity and honor among members of the profession.

The 15-member commission includes five judges and two lay members appointed by the Supreme Court, six attorneys appointed by the Ohio Metropolitan Bar Association Consortium and Ohio State Bar Association, and two law school administrators or faculty. The duties of the commission include:

- Monitoring and coordinating professionalism efforts and activities in Ohio courts, bar associations and law schools, and in jurisdictions outside Ohio
- Promoting and sponsoring state and local activities that emphasize and enhance professionalism
- Developing educational materials and other information for use by judicial organizations, bar associations, law schools and other entities
- Assisting in the development of law school orientation programs and curricula, new lawyer training and continuing education programs
- Making recommendations to the Supreme Court, judicial organizations, bar associations, law schools and other entities on methods for enhancing professionalism
- Overseeing and administering a mentoring program for attorneys newly admitted to the practice of law in Ohio.

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THE SUPREME COURT *of* OHIO

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**THE TRIALS and TRIBULATIONS
of STEP-PARENT ADOPTIONS –
ONE JUDGE’S PERSPECTIVE**

Hon. Albert S. Camplese
Ashtabula County Probate Court

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

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

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

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

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

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

STEP-PARENT ADOPTIONS

I. PRELIMINARY MATTERS

CHAPTER 3107 – ADOPTION

Section 3107.02 -WHO MAY BE ADOPTED

(A) **Any minor child;**

(B) **An adult** may be adopted under any of the following conditions:

...

(3) If the adult had established a child-foster caregiver, kinship caregiver, **or child-stepparent relationship with the petitioners as a minor, and the adult consents** to the adoption;

...

(5) If the adult is **the child of the spouse of the petitioner**, and the **adult consents** to the adoption.

(C) When proceedings to adopt a minor are initiated by the filing of a petition, and the **eighteenth birthday** of the minor occurs **prior to the decision of the court**, the court **shall require** the person who is to be adopted to submit a written statement of consent or objection to the adoption. **If an objection** is submitted, the petition shall be **dismissed**, and if a consent is submitted, the court shall proceed with the case, and may issue an interlocutory order or final decree of adoption.

Section 3107.03 - WHO MAY ADOPT

...

(D) A married adult without the other spouse joining as a petitioner if any of the following apply:

(1) The other spouse is a parent of the person to be adopted and supports the adoption;

...

Section 3107.031 - ASSESSOR TO CONDUCT HOME STUDY - FALSE STATEMENTS

Except as otherwise provided in this section, **an assessor shall conduct a home study for the purpose of ascertaining whether a person seeking to adopt a minor is suitable to adopt.** A written report of the home study **shall be filed with the court at least ten days before the petition for adoption is heard.**

...

Upon order of the court, **the costs of the home study and other proceedings shall be paid by the person seeking to adopt,** and, if the home study is conducted by a public agency or public employee, the part of the cost representing any services and expenses shall be taxed as costs and paid into the state treasury or county treasury, as the court may direct.

On request, the assessor shall provide the person seeking to adopt a copy of the report of the home study. The assessor shall delete from that copy any provisions concerning the opinion of other persons, excluding the assessor, of the person's suitability to adopt a minor.

...

Section 3107.034 - SEARCH REPORT TO INCLUDE ABUSE/NEGLECT INFORMATION.

- (A) **Whenever a prospective adoptive parent or a person eighteen years of age or older who resides with a prospective adoptive parent has resided in another state within the five-year period immediately prior to the date on which a criminal records check is requested** for the person under division (A) of section 2151.86 of the Revised Code, the administrative director of an agency, or **attorney, who arranges the adoption for the prospective adoptive parent shall request a check of the central registry of abuse and neglect of this state from the department of job and family services regarding the prospective adoptive parent or the person eighteen years of age or older who resides with the prospective adoptive parent to enable the agency or attorney to check any child abuse and neglect registry maintained by that other state.** The administrative director or **attorney shall make the request and shall review the results of the check before a final decree of adoption or an interlocutory order of adoption making the person an adoptive parent may be made.** Information received pursuant to the request shall be considered for purposes of this chapter as if it were a summary report required under section 3107.033 of the Revised Code. The department of job and family services shall comply with any request to check the central registry that is similar to the request described in this division and that is received from any other state.

...

Section 3107.035 - SEARCH OF NATIONAL SEX OFFENDER WEB SITE.

- (A) **At the time of the initial home study**, and every two years thereafter, if the home study is updated, and until it becomes part of a final decree of adoption or an interlocutory order of adoption, the agency or **attorney that arranges an adoption** for the prospective adoptive parent **shall conduct a search of the United States department of justice national sex offender public web site** regarding the prospective adoptive parent and all persons eighteen years of age or older who reside with the prospective adoptive parent.

II. FILING THE ADOPTION

Section 3107.04 – FILING PETITION - CAPTION

- (A) A petition for adoption shall be filed **in the court in the county** in which the person to be adopted **was born**, or in which, at the time of filing the petition, **the petitioner or the person to be adopted or parent of the person to be adopted resides**, or in which the petitioner is **stationed in military service**,

...

Section 3107.05 CONTENTS OF PETITION

- (A) A petition for adoption **shall be prepared and filed according to the procedure for commencing an action under the Rules of Civil Procedure**. It shall include the following information:
- (1) The date and place of birth of the person to be adopted, if known;
 - (2) The name of the person to be adopted, if known;
 - (3) The name to be used for the person to be adopted;
 - (4) The date of placement of a minor and the name of the person placing the minor;
 - (5) The full name, age, place, and duration of residence of the petitioner;
 - (6) The marital status of the petitioner, including the date and place of marriage, if married;
 - (7) **The relationship to the petitioner of the person to be adopted;**
 - (8) That the petitioner has facilities and resources suitable to provide for the nurture and care of the person to be adopted, and that it is the desire of the petitioner to establish the relationship of parent and child with the person to be adopted;
 - (9) A description and estimate of value of all property of the person to be adopted;
 - (10) **The name and address, if known, of any person whose consent to the adoption is required, but who has not consented, and facts that explain the lack of the consent normally required to the adoption.**
- (B) A **certified copy of the birth certificate of the person to be adopted**, if available, and **ordinary copies of the required consents**, and relinquishments of consents, if any, shall be filed with the clerk.

Section 3107.051 - TIME FOR FILING.

ORC 3107.051 (B) (1) exempts a step-parent from the timetable normally applicable to third-party adoptions. (90 days after placement in the home).

Section 3107.055 PRELIMINARY ESTIMATE AND FINAL ACCOUNTING - SUMMARY OF PROCEEDINGS.

ORC 3107.055 (F) provides: "This section does not apply to an adoption by a stepparent whose spouse is a biological or adoptive parent of the minor."

PRACTICE POINTER:

- This means attorney fees are not subject to potential reduction as normally allowed by 3107.055 (D).

Section 3107.06 CONSENT TO ADOPTION.

Unless consent is not required under section 3107.07 of the Revised Code, a petition to adopt a minor may be granted only if written consent to the adoption has been executed by all of the following:

(A) The **mother of the minor**;

(B) The **father of the minor**, if any of the following apply:

(1) The minor was **conceived or born while the father was married** to the mother;

(2) The minor is **his child by adoption**;

(3) **Prior to the date the petition was filed, it was determined by a court** proceeding pursuant to sections 3111.01 to 3111.18 of the Revised Code, a court proceeding in another state, an administrative proceeding pursuant to sections 3111.38 to 3111.54 of the Revised Code, or an administrative proceeding in another state **that he has a parent and child relationship with the minor**;

(4) He **acknowledged paternity of the child** and that acknowledgment **has become final** pursuant to section 2151.232, 3111.25, or 3111.821 of the Revised Code.

(C) The **putative father** of the minor;

...

(E) **The minor, if more than twelve years of age**, unless the court, finding that it is in the best interest of the minor, determines that the minor's consent is not required.

PRACTICE POINTER:

- Consent of a parent who is married to the petitioner and supports the adoption is not required via the operation of ORC 3107.07 (E).
- Consent to adoption does not serve as a substitute for service of process requirements per

Ohio Rule of Civil Procedure. Civ.Rules 4 through 4.7; *see, also*, 3107.11 (C).

- Inquire whether other parent will consent to adoption. Child support terminates upon adoption. Existing arrearage owing to parent can be waived. State arrearages may not be waived. *See, Eckliff v. Walters*, 168 Ohio App.3d 727, 861 N.E.2d 843 (11th Dist.C.A. 2006); *Utt v. Utt*, 2003 WL 23000154, 2003-Ohio-7043 (4th Dist.C.A.).
- If no consent, determine whether consent is unnecessary per ORC 3107.07

Section 3107.061 - PUTATIVE FATHER ON NOTICE THAT CONSENT UNNECESSARY.

A man who has sexual intercourse with a woman is on notice that if a child is born as a result and the man is the putative father, the child may be adopted without his consent pursuant to division (B) of section 3107.07 of the Revised Code.

Section 3107.062 - PUTATIVE FATHER REGISTRY.

“The department of job and family services shall establish a putative father registry. ...”

“A putative father may register at any time. **For the purpose of preserving the requirement of his consent to an adoption**, a putative father shall register **before or not later than fifteen days after the birth of the child**. ...”

...

Section 3107.063 - SEARCHING PUTATIVE FATHER REGISTRY.

(A) **An attorney arranging a minor's adoption**, a mother, a public children services agency, a private noncustodial agency, or a private child placing agency **may request** at any time that **the department of job and family services search the putative father registry to determine whether a man is registered as the minor's putative father**. The request shall include the mother's name. On receipt of the request, the department shall search the registry. If the department determines that a man is registered as the minor's putative father, it shall provide the attorney, mother, or agency a certified copy of the man's registration form. If the department determines that no man is registered as the minor's putative father, it shall provide the attorney, mother, or agency a certified written statement to that effect. The department shall specify in the statement the date the search request was submitted. No fee shall be charged for searching the registry. Division (B) of section 3107.17 of the Revised Code does not apply to this section.

(B) If the department of job and family services provides a certified copy of a putative father's registration form pursuant to division (A) of this section, the department also shall provide a written notice to the putative father:

- (1) That he may be the father of the minor he claims as his child on the registration form;
- (2) That the minor is being or may be placed for adoption; and
- (3) Of his right to consent or refuse to consent to the minor's adoption to the extent

provided under Chapter 3107 of the Revised Code.

- (C) The department shall provide the notice under this section not later than ten business days after the date it provides the certified copy of the registration form pursuant to division (A) of this section.

Section 3107.064 - FILING CERTIFIED RESULTS OF SEARCH.

(A) Except as provided in division (B) of this section, **a court shall not issue a final decree of adoption** or finalize an interlocutory order of adoption **unless the mother** placing the minor for adoption or the agency **or attorney arranging the adoption files with the court a certified document** provided by the department of job and family services under section 3107.063 of the Revised Code. **The court shall not accept the document unless the date the department places on the document pursuant to that section is sixteen or more days after the date of the minor's birth.**

(B) **The document** described in division (A) of this section **is not required if any of the following apply:**

- (1) The mother was married at the time the minor was conceived or born;
- (2) The parent placing the minor for adoption previously adopted the minor;
- (3) **Prior to the date a petition to adopt the minor is filed**, a man has been determined to have a parent and child relationship with the minor by a court proceeding pursuant to sections 3111.01 to 3111.18 of the Revised Code, a court proceeding in another state, an administrative agency proceeding pursuant to sections 3111.38 to 3111.54 of the Revised Code, or an administrative agency proceeding in another state;
- (4) The minor's father acknowledged paternity of the minor and that acknowledgment has become final pursuant to section 2151.232, 3111.25, or 3111.821 of the Revised Code;
- (5) A public children services agency has permanent custody of the minor pursuant to Chapter 2151 or division (B) of section 5103.15 of the Revised Code after both parents lost or surrendered parental rights, privileges, and responsibilities over the minor.

Section 3107.07 - CONSENT UNNECESSARY.

Consent to adoption is not required of any of the following:

- (A) A parent of a minor, when it is **alleged in the adoption petition** and the court, after proper service of notice and hearing, finds by **clear and convincing evidence** that the parent has failed **without justifiable cause** to provide **more than de minimis contact with the minor** or 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 either the filing of the adoption petition** or the placement of the minor in the home of the petitioner.
- (B) The **putative father of a minor** if **either** of the following applies:

(1) The putative father **fails to register as the minor's putative father** with the putative father registry established under section 3107.062 of the Revised Code not later than fifteen days after the minor's birth;

(2) The court finds, after proper service of notice and hearing, that any of the following are the case:

(a) The putative father is not the father of the minor;

(b) The putative father has willfully abandoned or failed to care for and support the minor;

(c) The putative father has willfully abandoned the mother of the minor during her pregnancy and up to the time of her surrender of the minor, or the minor's placement in the home of the petitioner, whichever occurs first.

...

(E) A parent who is married to the petitioner and supports the adoption;

...

(G) A legal guardian or guardian ad litem of a parent judicially declared incompetent in a separate court proceeding who has failed to respond in writing to a request for consent, for a period of thirty days, or who, after examination of the written reasons for withholding consent, is found by the court to be withholding consent unreasonably;

...

PRACTICE POINTER:

- Either a failure to maintain at least *de minimis* contact **OR** a failure to provide for maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding either the filing of the adoption petition or the placement of the minor in the home of the petitioner will suffice to negate necessity of consent.

Section 3107.08 - EXECUTING CONSENT.

(A) The required consent to adoption may be executed at any time after seventy-two hours after the birth of a minor, and shall be executed in the following manner:

(1) **If by the person to be adopted, in the presence of the court;**

...

(3) If by any other person except a minor, in the presence of the court or in the presence of a person authorized to take acknowledgements;

...

(5) If by a minor parent, pursuant to section 5103.16 of the Revised Code.

- (B) A consent which does not name or otherwise identify the prospective adopting parent is valid if it contains a statement by the person giving consent that it was voluntarily executed irrespective of disclosure of the name or other identification of the prospective adopting parent.

Section 3107.081 - CONDITIONS FOR ACCEPTING PARENT'S CONSENT.

...

- (E) **If a minor is to be adopted by a stepparent**, the parent who is not married to the stepparent **may consent to the minor's adoption without appearing personally before a court** if the parent executes consent in the presence of a person authorized to take acknowledgments. The attorney arranging the adoption shall file the consent with the court and give the parent a copy of the consent. The court and attorney shall keep a copy of the consent in the court and attorney's records of the adoption.

Section 3107.082 - DUTIES OF ASSESSOR PRIOR TO EXECUTION OF CONSENT.

Not less than seventy-two hours prior to the date a parent executes consent to the adoption of the parent's child under section 3107.081 of the Revised Code, an assessor shall meet in person with the parent and do both of the following **unless the child is to be adopted by a stepparent** or the parent resides in another state:

...

Section 3107.084 - WITHDRAWING CONSENT.

- (A) A consent to adoption is **irrevocable and cannot be withdrawn after the entry of an interlocutory order or after the entry of a final decree of adoption when no interlocutory order has been entered**. The consent of a minor is not voidable by reason of the minor's age.
- (B) A consent to **adoption may be withdrawn prior to the entry of an interlocutory order or prior to the entry of a final decree of adoption when no interlocutory order has been entered if the court finds after hearing that the withdrawal is in the best interest of the person to be adopted and the court by order authorizes the withdrawal of consent**. Notice of the hearing shall be given to the petitioner, the person seeking the withdrawal of consent, and the agency placing the minor for adoption.

Section 3107.09 - TAKING SOCIAL AND MEDICAL HISTORIES OF BIOLOGICAL PARENTS.

...

- (B) An assessor shall record the social and medical histories of the biological parents of a minor available for adoption, **unless the minor is to be adopted by the minor's stepparent or grandparent.** ...

...

Section 3107.10 - OUT-OF-COUNTY ADOPTION - NOTICE TO AGENCY WHERE PARENT RESIDES.

...

- (E) This section **does not apply to an adoption by a stepparent** whose spouse is a biological or adoptive parent of the minor to be adopted.

Section 3107.101 - POST-PLACEMENT PROSPECTIVE ADOPTIVE HOME VISIT.

...

- (D) This section **does not apply to an adoption by a stepparent** whose spouse is a biological or adoptive parent of the minor to be adopted.

Section 3107.11 - HEARING - NOTICE.

- (A) After the filing of a petition to adopt an adult or a minor, the court shall fix a time and place for hearing the petition. The hearing may take place at any time more than thirty days after the date on which the minor is placed in the home of the petitioner. **At least twenty days before the date of hearing, notice of the filing of the petition and of the time and place of hearing shall be given by the court to all of the following:**

(1) Any juvenile court, agency, or person whose consent to the adoption is required by this chapter but who has not consented;

(2) **A person whose consent is not required as provided by division (A), (G), (H), or (I) of section 3107.07 of the Revised Code and has not consented;**

(3) Any guardian, custodian, or other party who has temporary custody or permanent custody of the child.

Notice shall not be given to a person whose consent is not required as provided by division (B), (C), (D), (E), (F), or (J) of section 3107.07, or section 3107.071, of the Revised Code. Second notice shall not be given to a juvenile court, agency, or person whose consent is not required as provided by division (K) of section 3107.07 of the Revised Code because the court, agency, or person failed to file an objection to the petition

within fourteen days after proof was filed pursuant to division (B) of this section that a first notice was given to the court, agency, or person pursuant to division (A) (1) of this section.

- (B) Upon the filing of a petition for adoption that alleges that a parent has failed without justifiable cause to provide more than de minimis contact with the minor or to provide for the maintenance and support of the minor, the clerk of courts shall send a notice to that parent with the following language in boldface type and in all capital letters:

"A FINAL DECREE OF ADOPTION, IF GRANTED, WILL RELIEVE YOU OF ALL PARENTAL RIGHTS AND RESPONSIBILITIES, INCLUDING THE RIGHT TO CONTACT THE MINOR, AND, EXCEPT WITH RESPECT TO A SPOUSE OF THE ADOPTION PETITIONER AND RELATIVES OF THAT SPOUSE, TERMINATE ALL LEGAL RELATIONSHIPS BETWEEN THE MINOR AND YOU AND THE MINOR'S OTHER RELATIVES, SO THAT THE MINOR THEREAFTER IS A STRANGER TO YOU AND THE MINOR'S FORMER RELATIVES FOR ALL PURPOSES. **IF YOU WISH TO CONTEST THE ADOPTION, YOU MUST FILE AN OBJECTION TO THE PETITION WITHIN FOURTEEN DAYS AFTER PROOF OF SERVICE OF NOTICE OF THE FILING OF THE PETITION AND OF THE TIME AND PLACE OF HEARING IS GIVEN TO YOU. IF YOU WISH TO CONTEST THE ADOPTION, YOU MUST ALSO APPEAR AT THE HEARING. A FINAL DECREE OF ADOPTION MAY BE ENTERED IF YOU FAIL TO FILE AN OBJECTION TO THE ADOPTION PETITION OR APPEAR AT THE HEARING.**"

- (C) All notices required under this section shall be given as specified in the Rules of Civil Procedure. **Proof of the giving of notice shall be filed with the court before the petition is heard.**

Section 3107.12 - PREFINALIZATION ASSESSMENT OF MINOR AND PETITIONER.

...

- (B) This section **does not apply if the petitioner is the minor's stepparent**, unless a court, after determining a prefinalization assessment is in the best interest of the minor, orders that an assessor conduct a prefinalization assessment.

...

Section 3107.13 - WAITING PERIOD PRIOR TO FINALITY.

- (A) **A final decree of adoption shall not be issued and an interlocutory order of adoption does not become final**, until the person to be adopted has lived in the adoptive home for at least six months after placement by an agency, or for at least six months after the department of job and family services or the court has been informed of the placement of the person with the petitioner, and the department or court has had an opportunity to observe or investigate the adoptive home, or **in the case of adoption by a stepparent, until at least six months after the filing of the petition, or until the child has lived in the home for at least six months.**

...

**Section 3107.14 - PRESENCE OF PETITIONER AND ADOPTEE AT HEARING - CONTINUANCE –
FINAL DECREE OR INTERLOCUTORY ORDER.**

- (A) The **petitioner and the person sought to be adopted shall appear at the hearing** on the petition, **unless** the presence of either is **excused** by the court for good cause shown.
- (B) The court may continue the hearing from time to time to permit further observation, investigation, or consideration of any facts or circumstances affecting the granting of the petition, and may examine the petitioners separate and apart from each other.
- (C) **If, at the conclusion of the hearing, the court finds that the required consents have been obtained or excused and that the adoption is in the best interest of the person sought to be adopted as supported by the evidence, it may issue,** subject to division (C)(1) of section 2151.86, section 3107.064, and division (E) of section 3107.09 of the Revised Code, and any other limitations specified in this chapter, **a final decree of adoption or an interlocutory order of adoption**, which by its own terms automatically becomes a final decree of adoption on a date specified in the order, which, except as provided in division (B) of section 3107.13 of the Revised Code, **shall not be less than six months or more than one year from the date the person to be adopted is placed in the petitioner's home, unless sooner vacated by the court for good cause shown.** In determining whether the adoption is in the best interest of the person sought to be adopted, the court shall not consider the age of the petitioner if the petitioner is old enough to adopt as provided by section 3107.03 of the Revised Code.
- (D) **If the requirements for a decree under division (C) of this section have not been satisfied** or the court vacates an interlocutory order of adoption, or if the court finds that a person sought to be adopted was placed in the home of the petitioner in violation of law, **the court shall dismiss the petition** and may determine the agency or person to have temporary or permanent custody of the person, which may include the agency or person that had custody prior to the filing of the petition or the petitioner, if the court finds it is in the best interest of the person as supported by the evidence, or if the person is a minor, the court may certify the case to the juvenile court of the county where the minor is then residing for appropriate action and disposition.

...

Section 3107.15 - EFFECT OF FINAL DECREE OR INTERLOCUTORY ORDER OF ADOPTION.

- (A) A final decree of adoption and an interlocutory order of adoption that has become final as issued by a court of this state, or a decree issued by a jurisdiction outside this state as recognized pursuant to section [3107.18](#) of the Revised Code, shall have the following effects as to all matters within the jurisdiction or before a court of this state, whether issued before or after May 30, 1996:
- (1) Except with respect to a spouse of the petitioner and relatives of the spouse, to relieve the biological or other legal parents of the adopted person of all parental rights and responsibilities, and to terminate all legal relationships between the adopted person and the adopted person's relatives, including the adopted person's biological or other legal parents, so that the adopted person thereafter is a stranger to the adopted person's former relatives for all purposes including inheritance and the interpretation or construction of documents, statutes, and instruments, whether executed before or after the adoption is decreed, which do not expressly include the person by name or by some designation not based on a parent and child or blood relationship;

...

- (B) Notwithstanding division (A) of this section, if the relationship of parent and child has not been terminated between a parent and that parent's child and a spouse of the other parent of the child adopts the child, **a grandparent's or relative's right to companionship or visitation pursuant to section 3109.11 of the Revised Code is not restricted or curtailed by the adoption.**

IMPORTANT EXCEPTION:

- ORC 3109.11 allows for the creation of reasonable companionship or visitation rights for the grandparents and relatives **of a deceased father or mother**. In such circumstances, the remarriage of the surviving parent of the child **or the adoption of the child by the spouse [stepparent] of the child does not affect the authority of the court under the statute to grant reasonable companionship or visitation rights with respect to the child to a grandparent or other relative of the deceased father or mother.**

...

Section 3107.16 - APPEALS.

...

- (C) Subject to the disposition of an appeal, upon the expiration of six months after an adoption decree is issued, the decree cannot be questioned by any person, including the petitioner, in any manner or upon any ground, including fraud, misrepresentation, failure to give any required notice, or lack of jurisdiction of

the parties or of the subject matter, **unless**, in the case of the adoption of a minor, the petitioner has not taken custody of the minor, or, **in the case of the adoption of a minor by a stepparent, the adoption would not have been granted but for fraud perpetrated by the petitioner or the petitioner's spouse,** or, in the case of the adoption of an adult, the adult had no knowledge of the decree within the six-month period.

Section 3107.161 - DETERMINING BEST INTEREST OF CHILD IN CONTESTED ADOPTION – BURDEN OF PROOF.

- (A) As used in this section, "the least detrimental available alternative" means the alternative that would have the least long-term negative impact on the child.
- (B) When a court makes a determination in a contested adoption concerning the best interest of a child, the court shall consider all relevant factors including, but not limited to, all of the following:
 - (1) The least detrimental available alternative for safeguarding the child's growth and development;
 - (2) The age and health of the child at the time the best interest determination is made and, if applicable, at the time the child was removed from the home;
 - (3) The wishes of the child in any case in which the child's age and maturity makes this feasible;
 - (4) The duration of the separation of the child from a parent;
 - (5) Whether the child will be able to enter into a more stable and permanent family relationship, taking into account the conditions of the child's current placement, the likelihood of future placements, and the results of prior placements;
 - (6) The likelihood of safe reunification with a parent within a reasonable period of time;
 - (7) The importance of providing permanency, stability, and continuity of relationships for the child;
 - (8) The child's interaction and interrelationship with the child's parents, siblings, and any other person who may significantly affect the child's best interest;

- (9) The child's adjustment to the child's current home, school, and community;
 - (10) The mental and physical health of all persons involved in the situation;
 - (11) Whether any person involved in the situation has been convicted of, pleaded guilty to, or accused of any criminal offense involving any act that resulted in a child being abused or neglected; whether the person, in a case in which a child has been adjudicated to be an abused or neglected child, has been determined to be the perpetrator of the abusive or neglectful act that is the basis of the adjudication; whether the person has been convicted of, pleaded guilty to, or accused of a violation of section [2919.25](#) of the Revised Code involving a victim who at the time of the commission of the offense was a member of the person's family or household; and whether the person has been convicted of, pleaded guilty to, or accused of any offense involving a victim who at the time of the commission of the offense was a member of the person's family or household and caused physical harm to the victim in the commission of the offense.
- (C) **A person who contests an adoption has the burden of providing the court material evidence needed to determine what is in the best interest of the child and must establish that the child's current placement is not the least detrimental available alternative.**

CIVIL PROCEDURE REFRESHER

Bernadette Bolas Genetin, Esq., Professor of Law
University of Akron School of Law

Bernadette Bollas Genetin



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Selected Works - bepress: http://works.bepress.com/bernadette_genetin/

Curriculum Vitae: [Download in PDF format](#)

Biography

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



CIVIL PROCEDURE

A Refresher

Bernadette Bollas Genetin

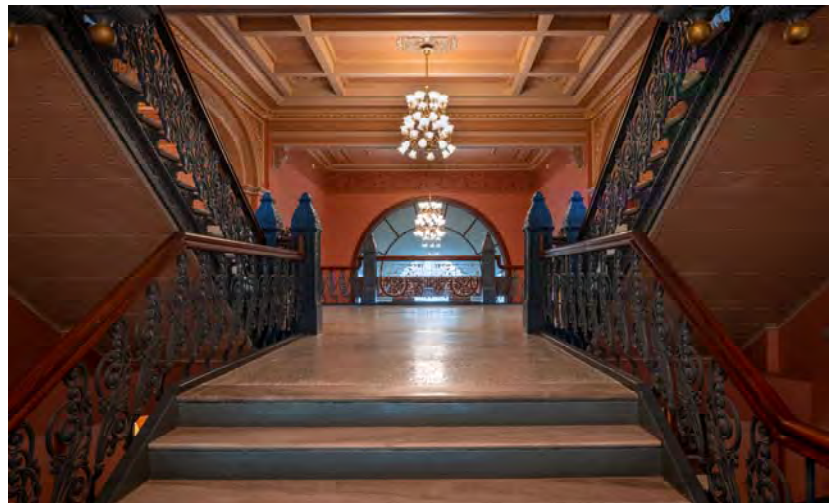
McDowell Professor of Law
The Univ. of Akron School of Law

Photography by
David Dingwell



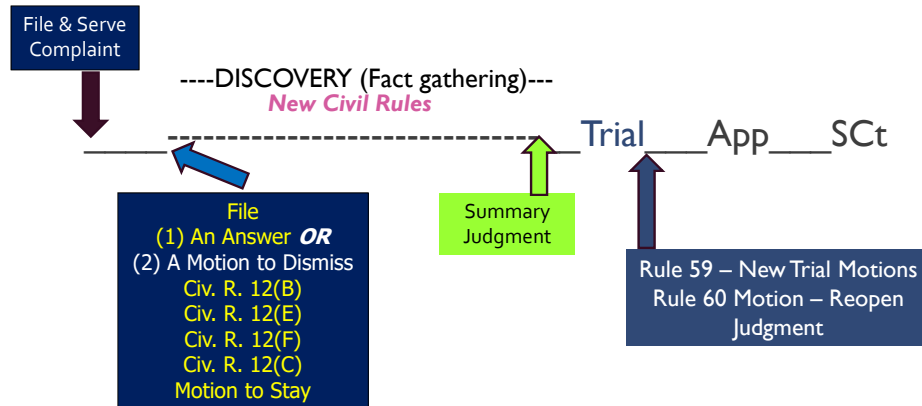
CIVIL PROCEDURE – A REFRESHER

- Commencement of the Action
- Rule 12 Motions
- July 1, 2020 Amendments
 - What's New? What's Not?
 - Waiving Service, Discovery, R. 16
- Summary Judgment – Rule 56
- Rule 60 -- Reopening the Judgment
 - And Rule 59 -- New Trials
 - What's the difference?



Trumbull County Courthouse

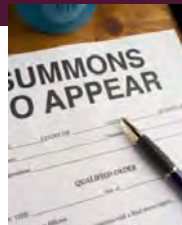
Typical Civil Case Timeline



RULES 4-4.6 – COMMENCEMENT OF THE ACTION & SERVICE OF SUMMONS

■ Serve Summons as in Rule 4-4.6 (R. 73(E))

- Complaint & Summons Served Together (R. 4(B))
- Clerk issues summons for each def listed in caption of complaint



■ Time Limit for Service

- 6 months, absent good cause (R. 4(E))
- Challenge failure to serve? – Party's motion or Court (R. 4(E))
- Absent good cause, court shall dismiss without prejudice
- May waive service – in writing, at least 18, and no disability

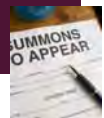
RULES 4.2-4.6 – SERVICE OF SUMMONS

- 4.1 - Permissible Ways to Serve
- Rule 4.2 – Who to Serve, by type of defendant
 - E.g., individuals, minors, corporations, partnerships, state or other levels of government
- Rule 4.3 and 4.5 – Out-of-State and Foreign
- Rule 4.4 – By publication – as a last resort or as permitted by statute
- *If fail to make service within 1 year? Action not “commenced”*



RULE 3(A) – COMMENCEMENT OF ACTION & SERVICE OF SUMMONS

- Civ. R. 3(A) A civil action is ***commenced by filing complaint*** with the court ***if service is made within 1 year*** ... Upon a named defendant, or upon an incorrectly named defendant whose name is later corrected [under Civ. R. 15(C)]”
- Service not made - statute of limitations implications
 - *Moore v. Mount Carmel Health System*, 162 Ohio St. 3d. 106 (2020)
 - “Savings Statute” – In any action that is commenced or attempted to be commenced . . . , if the plaintiff fails otherwise than upon the merits, the plaintiff . . . may commence a new action within one year after . . . plaintiff’s failure otherwise than upon the merits
 - To apply – (1) Action must be dismissed, and (2) Plaintiff must file a “new action”





RULE 12 MOTIONS

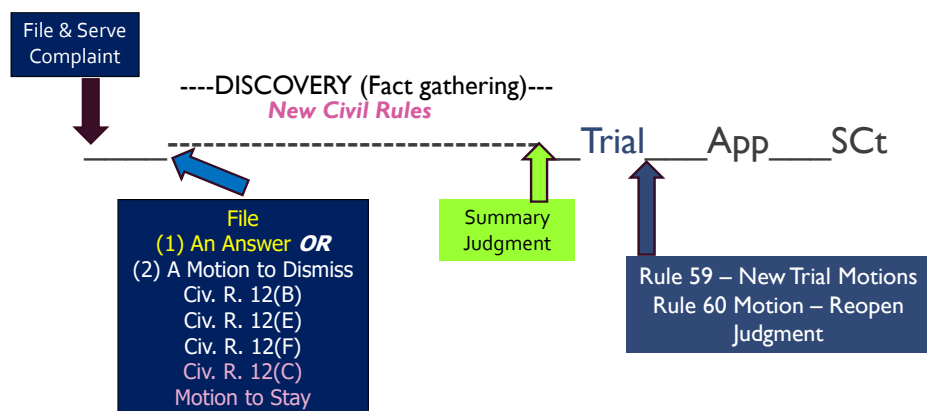
RULE 12(B) – TO DISMISS

RULE 12(E) & (F)

RULE 12(C) – JUDGMENT
ON PLEADINGS

MOTION TO STAY

Typical Civil Case Timeline



RULE 12 – *MOTIONS TO DISMISS*

■ Rule 12(B) Motions

- 12(B)(1) – Subject Matter Jurisdiction
- 12(B)(2) – Personal Jurisdiction
- 12(B)(3) – Venue
- 12(B)(4) – Insufficiency of Process
- 12(B)(5) – Insufficiency of Service of Process
- 12(B)(6) – Failure to state a claim upon which relief may be granted
- 12(B)(7) – Failure to join a party under Rule 19 or 19.1

■ Timing of motions & Waiver – 12(B), (G), and (H)

- **Immediately Waived, If Not Asserted** - Personal juris, venue, process, service of process – 12(H)(1)
- **Preserved Through Trial** - Failure to state a claim; substantive defenses; failure to join party – 12(H)(2)
- **Not waived** -- Lack of subject matter jurisdiction – 12(H)(3)

RULE 12 – *MOTIONS TO DISMISS*

■ Failure to State a Claim – Rule 12(B)(6)

- Based on allegations of complaint
- Plf will get a chance to replead

■ More Definite Statement -- Rule 12(E) Motion

- Rarely available to challenge complaint
- Vague or ambiguous answers
- Make before a responsive pleading

■ Motion to Strike – Rule 12(F)

- Redundant, immaterial, impertinent, or scandalous matter
- Insufficient allegation in complaint or defense
- Make before a responsive pleading

RULE 12 – *ADDITIONAL MOTIONS*

- **Motion for Judgment on the Pleadings – Rule 12(C)**
 - Filed after pleadings are closed, but before will delay trial
 - May be filed by plaintiff or defendant
 - Even if much discovery has taken place, but no discovery considered
 - For questions of law
 - Plaintiff ordinarily may replead

RULE 12 – *ADDITIONAL MOTIONS*

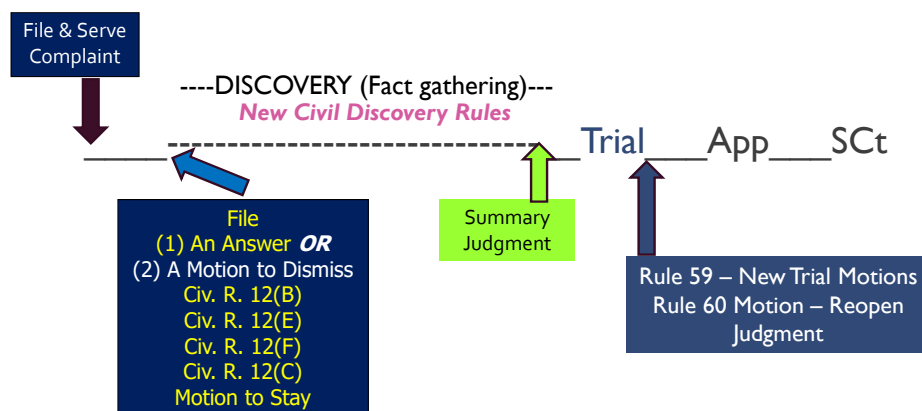
- **Motion to stay second suit on same action**
 - **In rem action** – first-filed action has jurisdiction. *State ex rel. Phillips v. Polcar*, 50 Ohio St. 2d 279 (1977)
 - **In Personam action** –
 - Both courts may retain jurisdiction
 - May move to stay second-filed action
 - Within discretion of trial court to grant stay or continue with action
 - If continue, the first court to judgment controls



July 1, 2020 Amendments *Civil Rules*

R. 4.7 - WAIVER OF SERVICE
R. 26 – DISCOVERY
R. 16 – PRETRIAL PROC.

Typical Civil Case Timeline



R. 4.7 – WAIVER OF SERVICE

Effective July 1, 2020

- **Rule 4.7(A) – An individual, corporation, partnership, or association** has a duty to avoid unnecessary expenses of service of process. An indiv Def must be 18 years or older and not under a disability
 - Plf must send (1) complaint; (2) 2 copies – request for waiver form; and (3) prepaid means of return
 - State date when request is sent & give reasonable time to return waiver (at least 28 days in U.S. & 60 if outside U.S.)
 - Use first-class mail or other reliable service
- **Rule 4.7(B) – Plf may request waiver** of service by defendants for civil actions in Common Pleas Court
 - Except civil protection orders under Civ. R. 65.1
- **4.7(C) – Failure to Waive** – If Def fails, without good cause, to waive service
 - Court may impose cost of service and of motion to collect service expenses (& atty fees)
 - Good cause should be “rare” – includes did not receive request, not sufficiently literate in English to read request
- **4.7(D) – Extended Time to Answer If Waive** – 60 days after request sent; 90 days, if outside U.S.
- **4.7(E) – Filing of Def’s Waiver** is treated as if summons and complaint had been served on date of filing
- **4.7(F) – Defenses of jurisdiction and venue are not waived**

RULE 26(B) – SCOPE OF DISCOVERY

Effective July 1, 2020

- **26(B)(1) – Adds “proportionality”** to discovery scope
- 26(B)(2) – Insurance Agreements
- **26(B)(3) – Initial Disclosure by Parties**
- 26(B)(4) – Trial Preparation/Work Product – (B)(3)
- 26(B)(5) – Specific Limits on ESI (B)(4)
- **26(B)(6) – Limits on Frequency and Extent**
- 26(B)(7) – **Disclosure/Reports** of Expert Testimony- (B)(5)
- 26(B)(8) – Claims of Privilege or Trial-Protection (B)(6)



RULE 26(B)(1)

Effective July 20, 2020

■ (B) Scope of Discovery.

(1) **In General.** Unless otherwise limited by court order, the scope of discovery is as follows. Parties may obtain discovery regarding **any (1) nonprivileged matter (2) that is relevant to any party's claim or defense and (3) proportional to the needs of the case, considering** the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

FORMER RULE 26(B)(1)

■ Scope of Discovery

- **In General.** Parties may obtain discovery regarding any matter, (1) not privileged, which is (2) relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, electronically stored information, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

RULE 26(B)(1)

Effective July 1, 2020

■ (B) Scope of Discovery.

(1) In General. Unless otherwise limited by court order, the scope of discovery is as follows. Parties may obtain discovery regarding *any (1) nonprivileged matter (2) that is relevant to any party's claim or defense and (3) proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.* Information within this scope of discovery need not be admissible in evidence to be discoverable.

INITIAL DISCLOSURES – RULE 26(B)(3)

Effective July 1, 2020

■ 26(B)(3) Initial Disclosure by a Party.

■ Four categories of key information about a party's own case

- Individuals likely to have discoverable information that a disclosing party "may use to support its claims or defenses," unless the use would be solely for impeachment
- Docs, ESI, and tangible things a disclosing party may use to support case, unless solely for impeachment
- Computation of each category of damages & documents on which based
- Insurance agreements that may apply

■ Must provide these disclosures *without* a request

■ No later than the parties' first pre-trial or case management conf. or as in a stipulation or court order

■ Some cases exempted – actions to review admin record; by unrepresented person in U.S., state, or local custody, to enforce/quash admin summons or subpoena, ancillary to a proceeding in another court, or to enforce an arbitration award

RULE 26(B)(6) LIMITATIONS ON FREQUENCY AND EXTENT

Effective July 1, 2020

26(B)(6)(a) When Permitted. By order, the court may limit the number of depositions, requests to admit, interrogatories, or the length of depositions.

26(B)(6)(b) When Required. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rules if it determines that:

(i) the discovery sought is **unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;**

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the proposed discovery is outside the scope permitted by Rule 26(B)(1).

EXPERT DISCLOSURE – RULE 26(B)(7)

Effective July 1, 2020

- **Must disclose** expert witnesses – 26(B)(7)(a)
- **Must exchange expert witness report & CV** in accord with Court's schedule – 26(B)(7)(b)
 - Party with burden on an issues submits report first. Responding party submits at scheduled time
- **May not call expert if** did not procure and exchange expert report, except healthcare – 26(B)(7)(c)
 - Report to include a complete statement of all opinions and the basis and reasons for them on each matter on which the expert will testify. No testimony or opinions permitted on matter not disclosed in report.
 - Expert's compensation
 - All reports and supplemental reports must be supplied no later than 30 days before trial, absent good cause.
- **No report needed for Healthcare Providers** who have supplied records and will testify about records. Includes medical, dental, optometric, chiropractic, or mental health care records – 26(B)(7)(d)
- **No discovery depositions of opponent's experts until** mutual exchange of expert reports – 26(B)(7)(e)
- **No depositions of trial preparation experts absent** exceptional circumstances – 26(B)(7)(h)

RULE 26(F) – DISCOVERY PLANNING CONFERENCE BY PARTIES

Effective July 1, 2020

- **Attys and Unrepresented Parties Must Confer** no later than 21 days before a scheduling conference is held
- **Conference Content** – nature and basis of claims and defenses and possibility for settling; arrange disclosures; preserve discoverable info; and develop proposed discovery plan
- **File Written Discovery Plan Within 14 Days of Conference** – Views and proposals – initial disclosures; agreed discovery deadlines and case schedule issues; discovery issues; disclosure and exchange of docs from public records requests; issues regarding claims of privilege or trial-preparation materials; changes in discovery limits; orders the court should issue (protective or under Rule 16); and modifications to scheduling orders
- **Some Cases Excepted** – cases excepted from the Civil Rules in Rule 1(C)

CIVIL RULE 16

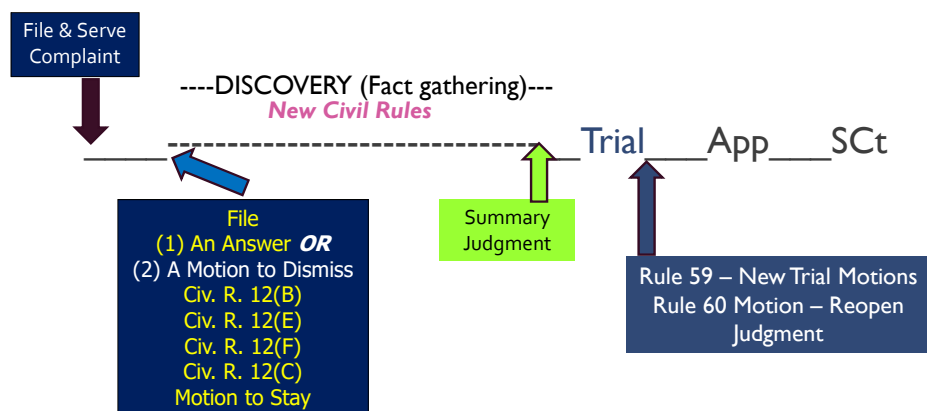
Pretrial Conferences and Discovery Orders

- **16(B) Scheduling orders are mandatory** (But not cases excepted from Civ Rules in Rule 1(C))
 - **When** -- After receiving 26(F) Report; after consulting with attorneys and unrepresented parties at a scheduling conference; or sua sponte
 - **Contents permissive** – timing for joinder of parties, amending pleadings, completing discovery, dispositive motions, timing of disclosures (expert and pretrial), regarding ESI, dates for pretrial conferences and trial
- **16(C) Matters to consider at a pretrial conference** – settlement, amendments, medical reports and hospital records, number of experts, preservation of ESI and other ESI issues, disclosing docs obtained through public records requests
- **16(D) Court should issue orders** following pretrial conferences
- **16(E) Final pretrial conference and orders**



RULE 56 SUMMARY JUDGMENT

Typical Civil Case Timeline



RULE 56 – SUMMARY JUDGMENT

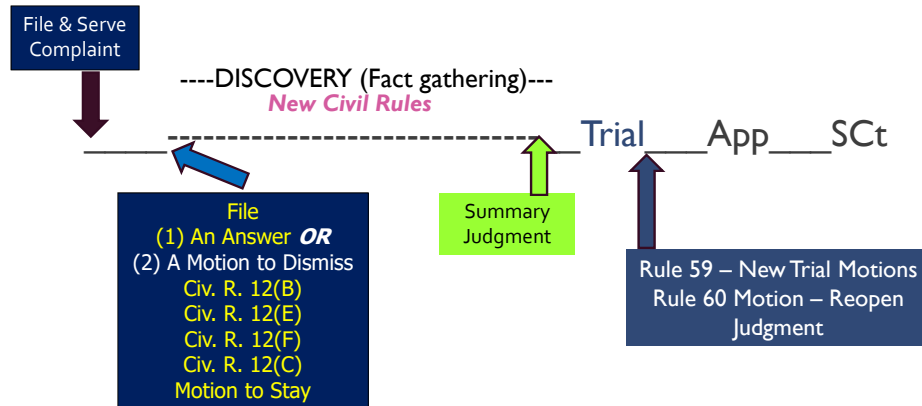
- **Civ. R. 56(A) -- For Party Seeking Affirmative Relief**
 - **What** - May move for SJ as to all or any part of claim, counterclaim, crossclaim, or declaratory judgment action
 - **When** – After time for responsive motion or pleading or after service of SJ by adverse party
- **Civ. R. 56(B) For Defending Party**
 - **What** - May move for SJ as to all or any part of claim, counterclaim, crossclaim, or declaratory judgment action
 - **When** – At any time
- **Civ. R. 56(C) - SJ Decision**
 - **Granted if** – There is no genuine issue as to a material fact and the moving party is entitled to judgment as a matter of law
 - **Based on** – Pleadings, depositions, interrogatory answers, admissions, affidavits, transcripts of evidence, and written stipulations
- **Civ. R. 56(F) – Insufficient time to Respond to SJ Motion**



RULE 60 & R. 59 COMPARISON

REOPENING JUDGMENTS
& NEW TRIALS

Typical Civil Case Timeline



RULE 59 – NEW TRIAL



- Basis for New Trial Motions (Rule 59(A))
 - 9 grounds, plus on other grounds for "good cause shown"
 - Some Grounds for New Trial– irregularity in proceedings; misconduct of jury or prevailing party; accident or surprise; excessive or inadequate damages; jgmt against the weight of the evidence (1 time); jgmt is contrary to law; newly discovered evidence
- If court grants, must state grounds with specificity in writing (Rule 59(A))
 - Nonjury – court may take additional evidence, amend order, and enter new judgment
 - Jury – usually retry entire case.
- Motion for new trial (R. 59(B) and (C))
 - W/in 28 days of entry of judgment (or service of notice of jgmt)
 - May attach affidavits
- New Trial on Initiative of Court (R. 59(D))

RULE 60(A) – RELIEF FROM JUDGMENT OR ORDER CLERICAL MISTAKES, OVERSIGHT, OR OMISSION

(A) Clerical Mistakes.

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

RULE 60 – RELIEF FROM JUDGMENT OR ORDER

- **Rule 60(A) – Clerical Mistakes – Court May Correct**
- **What?** Clerical mistakes, inadvertence, or omission in judgments, orders, or other parts of record
- **How?** On court's initiative or motion of a party
- **When?**
 - Any time, if pending in trial court
 - Before an appeal is docketed in appellate court or with leave of appellate court

RULE 60(B) – RELIEF FROM A FINAL JUDGMENT OR ORDER MISTAKES, INADVERTENCE, EXCUSABLE NEGLIGENCE, NEW EVIDENCE, FRAUD

- On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. **The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.**
- The procedure for obtaining any relief from a judgment shall be by motion prescribed in these rules.

REOPENED JUDGMENT – RULE 60(B)



- **Balancing finality, closure, and preparation vs. accuracy and fairness**
- **To obtain relief from judgment, must meet GTE Automatic Factors**
 - Party must have a meritorious claim or defense
 - Party must be entitled to relief under ground in Rule 60(B)(1)-(B)(5)
 - Motion must be made within a reasonable time, and for 60(b)(1)-(B)(3), within 1 year
 - *GTE Automatic Electric, Inc. v. ARC Indus., Inc.*, 47 Ohio St. 2d 146, 146 (1976)
- **A Rule 60(B) motion does not affect the finality of a judgment.**

REOPENED JUDGMENTS – RULE 60(B)



- **Balancing finality, closure, and preparation vs. accuracy and fairness**
- **Rule 60(B)(1)-(3) – Must be made w/in reas time & w/in 1 year**
 - (1) Mistake, inadvertence, surprise, or excusable neglect
 - (2) Newly discovered evid, that could not with reasonable diligence have been found within time for new trial under Rule 59(B) [R. 59(B) -- 28 days after entry of judgment]
 - (3) Fraud (whether intrinsic or extrinsic), misrep, or misconduct of opposing party
- **Rule 60(B)(4)-(5) Must be made w/in reas time & no 1-year time limit**
 - (4) Judgment has been satisfied, released or discharged; is based on an earlier judgment that has been reversed or vacated; or it would no longer be equitable to apply
 - (5) Any other reason that justifies relief. Includes “fraud on the court”

RULE 60(B) REOPENED JUDGMENT VS RULE 59 NEW TRIAL

Rule 60(B) – Reopened Judgment

- **Time? Reas time & (1 year limit - ((B)(1)-(3))**
 - Deadlines may not be enlarged
- **Basis? 5 enumerated, narrow categories**
- **How? By motion of a party**
- **Effect on Judgment? No effect**
- **Time to Appeal Underlying Judgment? No change. Have 30 days to appeal original judgment. If Rule 60(B) denied, may appeal denial as separate judgment**

Rule 59 – New Trial Motion

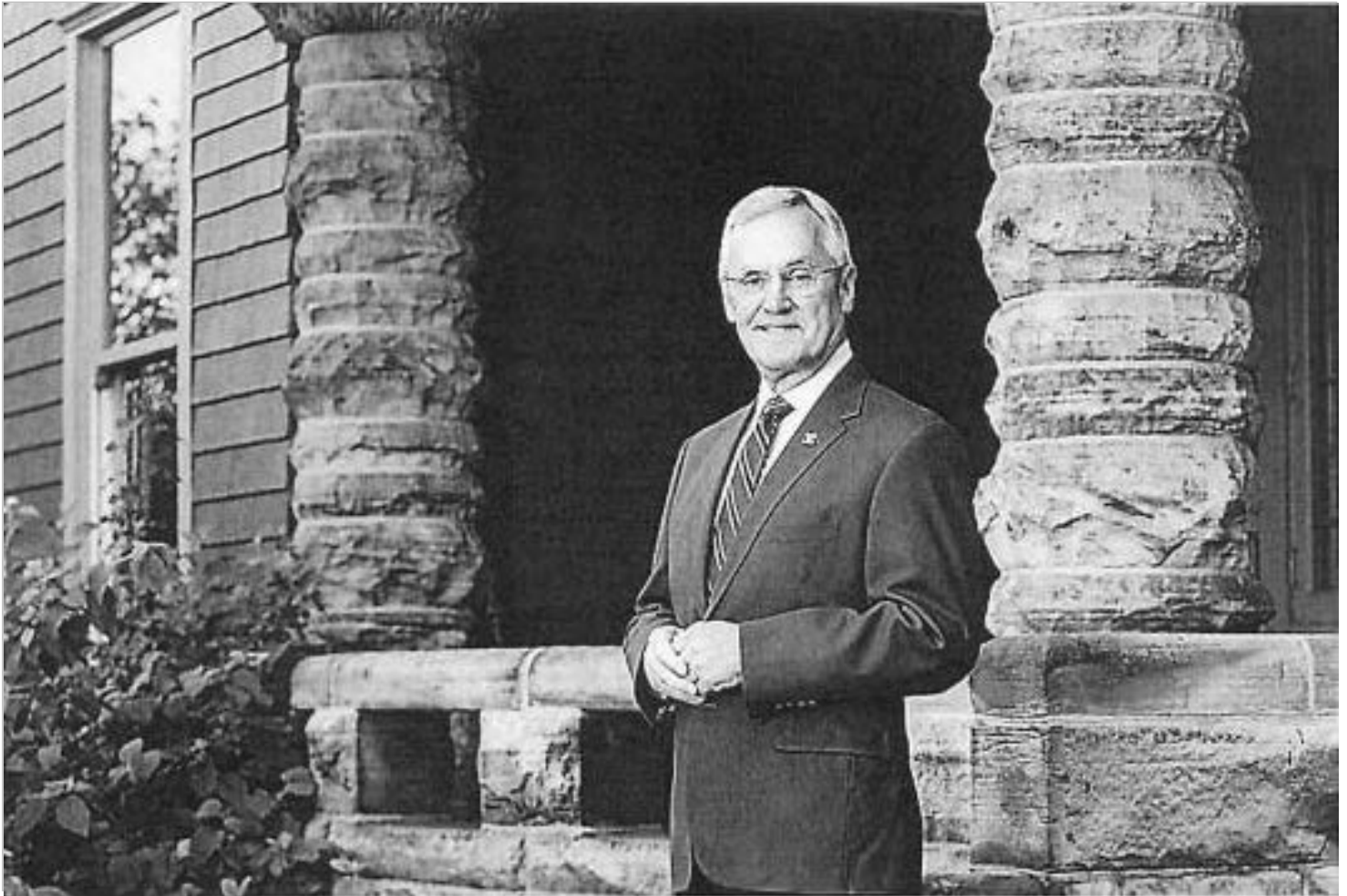
- **Time? 28 days after judgment (or after service)**
 - Deadlines may not be enlarged
- **Basis? 9 categories & “good cause”**
- **How? By motion or on court’s initiative**
- **Effect on judgment? Suspends judgment**
- **Time to Appeal Underlying Judgment? Tollen, pending decision on new trial motion.**

**LESSONS LEARNED, THE YSU
WE SEE TOMORROW CAMPAIGN
PHILANTHROPY IN AMERICA,
YESTERDAY, TODAY & TOMORROW**

Jim Tressel, President
Youngstown State University

Paul McFadden, President
Youngstown State University Foundation

About James P. Tressel | YSU



James P. Tressel became the ninth president of Youngstown State University in 2014 and has been busy moving the campus forward on many fronts ever since.

Under President Tressel's leadership, enrollment increased for the first time in five years, the academic quality of freshmen classes has continued upward, student retention is up and the university has solidly focused on student success - graduating on time, with little or no debt and with a job or plans for further education. In addition, the university is hitting record fund-raising levels, keeping the lid on tuition costs, expanding scholarship opportunities and increasing both university and private housing options across campus.

A native of Northeast Ohio, Tressel graduated from Berea High School in suburban Cleveland in 1971. He earned a bachelor's degree in Education from Baldwin-Wallace College in 1975 and a master's degree in Education from the University of Akron in 1977. He also holds honorary degrees from YSU in 2001 and Baldwin-Wallace in 2003.

He came to YSU in 1986 as head football coach. In 15 years, including six as executive director of Intercollegiate Athletics, YSU appeared in the playoffs 10 times and won four national championships. In January 2001, Tressel left YSU to become head football coach at Ohio State University. In 10 seasons, he guided the Buckeyes to the 2002 National Championship and seven Big Ten Championships. After leaving Ohio State, Tressel served as executive vice president for Student Success at the University of Akron, and then returned to YSU in 2014 as president.

Among his many honors: Chevrolet National Coach of the Year, the Eddie Robinson Coach of the Year Award, the American Football Coaches Association National Coach of the Year, the Paul “Bear” Bryant National Coach of the Year, and the Sporting News National Coach of the Year. He was inducted into Ohio State Athletics Hall of Fame in 2015. At YSU, he received the Heritage Award in 2008 and was inducted into the YSU Athletics Hall of Fame in 2013. He was enshrined into the College Football Hall of Fame in 2015.

He has published two books, has given hundreds of presentations and lectures across the country, and has had extensive involvement in fund raising and philanthropy, including the recent \$1 million gift to create the Jim and Ellen Tressel Student Work Opportunity Endowment Fund at YSU.

Tressel’s wife, Ellen, is a YSU graduate and an accomplished businesswoman and philanthropist who remains engaged in charitable causes and community organizations in cities where she and her husband have built careers and raised family, including Youngstown, Columbus and Akron. She began her own financial career in her family’s business in Youngstown and served 17 years at Butler, Wick and Co.

They are the proud parents of four accomplished adults: Zak, Carlee, Eric and Whitney. Their grandson, Jonathan James, and granddaughter, Rose Marie Alson, are the apples of their eyes.

President Tressel can be followed on twitter, @JimTressel5

- **Office of the President (/president)**
 - **About James P. Tressel (/president/about)**

Paul McFadden**President, Youngstown State University Foundation**

Paul Joined YSU in 1992 as the Director of Athletic Development. In 1998, he moved to the university's central development office as a Development Officer. In 2000, he was promoted to Chief Development Officer responsible for overseeing all the University's development functions. During his tenure as Chief Development Officer, he led Youngstown State University's largest fund-raising campaign to date, The Centennial Campaign, exceeding its \$43 million goal by \$9 million. He also led the University's efforts to raise \$12 million to build the Andrews Student Recreation and Wellness Center.

Paul became President of the YSU Foundation in December 2011, and has led the Foundation through its first strategic plan, and current \$100 million We See Tomorrow Capital Campaign.

He is active in the community serving on the Boards of the Mahoning Valley Historical Society, and the Poland Forest Foundation Board. He is the former Board Chair of the Youngstown Goodwill Industries. From 1984 to 1990 Paul was a place kicker, in the National Football League, for the Philadelphia Eagles, New York Giants and Atlanta Falcons.

He has a Bachelor's Degree in History from Youngstown State University and a Master's Degree in Philanthropy and Development from Saint Mary's University of Minnesota.

WHAT TO DO WHEN YOUR CLIENT LIES PROFESSIONALISM

Kimberly Vanover Riley, Esq.
Montgomery Jonson LLP

Kimberly Vanover Riley

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

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

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

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

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LIAR, LIAR:
WHAT TO DO WHEN
YOUR CLIENT LIES

40th Annual Probate Practice Seminar
Kim Riley, Esq.
October 1, 2021

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Clients' Lies 101:

When do clients lie?

What kinds of cases/circumstances increase the odds of them lying?

- To you
- To others – at deposition, at trial

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Client was interviewed by the FBI about his friend's activity, and gave in to the friend's pressure to feign ignorance. Now client is facing charges of making false statements and obstruction of justice.

***How do you counsel the client?
How can you get ahead of these concerns?***

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Client, when you lie to me:

- It's often to hide something I can work with—but *only if I know about it*.
- I'm less effective in representing you, and it reduces the odds of your success.
- Your cases lasts longer and will be more expensive.
- It hurts your credibility (and mine), and it hurts our ability to negotiate.
- I'm going to find out the truth, anyway—and the other side will, too. Worse yet, if the other side finds it *first*, I'm at a disadvantage.

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Explain the “Cone of Silence”

- 1.6 – Confidentiality
 - Lawyer shall not reveal information relating to representation, including attorney-client privileged information, without:
 - Client's informed consent
 - Client's implied authorization for representation
 - 1.6 Exceptions (1.6(b)-optional; 1.6(d)-mandatory)
(We'll talk about these exceptions later)

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You just successfully defended criminal charges for a client who you know to be actively engaged in drug dealing. He tells you he's not paying taxes on the income from this activity, either, and he asks you how to continue this practice.

How do you respond?

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Better (Not) Call Saul:

- 1.2(d)(1)—Can't assist or counsel client to engage in illegal/fraudulent conduct. May discuss consequences of proposed course of conduct & explaining validity, scope, meaning, or application of the law
 - E.g., 1.2(d)(2)—medical marijuana/federal law

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Your client is about to go to trial, accusing his employer of terminating him in retaliation for taking FMLA leave. The employer says it fired him for theft, which he denied. You believed him during his deposition, but after the other witnesses testified, you now suspect he may have lied.

Can you go to trial, despite your suspicions?

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Permissive exceptions (1.6(b))—when reasonably believe necessary to:

- Prevent certain death, substantial bodily harm, commission of a crime by client or others
- Mitigate substantial injury to financial interests/property resulting from client's illegal/fraudulent act connected to lawyer's services
- Secure legal advice about your own compliance with rules; establish your own claim/defense in matter involving client (e.g., malpractice, disciplinary, criminal)
- Comply with other law or court order
- Detect/resolve conflicts arising from employment/law firm change—but only if no compromise of ACP or prejudice to client

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3.3 – Candor Toward Tribunal

Lawyer may refuse to offer evidence, other than for criminal defendant, that s/he *reasonably believes* is false.

- But see 1.2, Comment [2]; 1.16(a)(3) and 1.16(b)(4)

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You're in the middle of defending a tax evasion matter, and your client has just given false testimony on the stand. Do you:

- a) Do nothing**
- b) Say "that's not what you've been telling me for the past 9 months"**
- c) Ask for a brief recess**
- d) Immediately move to withdraw**

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1.6 (Confidentiality) & 3.3 (Candor)

- Candor always wins
- Client fixes their lie—or you have to fix it
- If you know a witness is going to lie, don't call them

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Interplay of 3.3(a)(3) & 1.6(d)

- If lawyer learns of client's or witness's submission of false material evidence, lawyer *shall* take reasonable measures to remedy, *including if necessary*, disclosure.
 - Note: disclosure not the first/only option; 1.6 Comment [10]
 - First "remonstrate with the client confidentially," advising of duty of candor and seeking correction
 - Then, if refusal, correct.
- Even if client fires you or you withdraw, still an obligation to remedy.

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The “noisy” withdrawal

- Model Rule 1.6, Comment 10 says if mere withdrawal won't correct your role in the fraud, it “may be necessary...to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation, or the like.”
- Must attempt to withdraw without disclosing any more confidential information than is absolutely necessary.

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Your former client is under investigation for new charges. You receive a subpoena for information relating to that representation. Lawyers are supposed to be cooperative, right? Do you comply?

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RPC 1.6, Comment [15] See also ABA Opinion 473:

- A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure.
- Absent informed consent of the client to do otherwise, lawyer should assert all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law.
- In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, division (b)(6) permits the lawyer to comply with the court's order.

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Your new criminal client (Mr. Jones) provided a false name (Mr. Smith) when arrested on a misdemeanor, but he advised you he has several felony warrants outstanding in other states under his real name. The arraignment judge reads the case caption and asks how Mr. Smith pleads.

- OR -

The night before Mr. Johnson's trial, his mother calls and says "don't expect him to show up—he just left the house as high as a kite." He doesn't show the next morning, and the court asks "Do you have any idea why your client isn't here?"

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Navigating conflicts between maintaining confidences of clients and your own duty of candor

• Options:

- Obtaining informed consent (1.6) to provide accurate information (not an option for Johnson)
 - Note, even though information isn't privileged, it's still confidential; and if information were benign (e.g., he was in a car accident the night before), the answer would be different
- Advising the Court you are unable provide it with a response—and nothing more (3.3)

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Your FMLA trial with the accused theft proceeded two years ago with the client's story remaining the same—and he won. The jury didn't believe that he stole from his employer.

You just received a letter from your client's wife, explaining they are going through a divorce, and she enclosed proof of her husband's theft she discovered during her review of their marital assets.

You contact your client with this information, and he instructs you to keep this information confidential—he refuses consent to reveal his lie to the Court.

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1.6(d) Mandatory Obligation to Advise Court of False Testimony—Limited in Time

- Rule 1.6 Comment [13]: Not infinite—obligation expires upon final determination/expiration of time for Court to consider.

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You briefly represented wife in a divorce, and she fired you after you advised her that she could not hide assets from her soon-to-be ex-husband.

Four years later, she hired you again—while the divorce was still pending—and she is again failing to correct fraudulent practices to hide assets from her husband.

She isn't paying your bill, but you don't think the court will allow you to withdraw without an explanation, so you filed a motion to withdraw with an affidavit that informs the Court (and parties) that wife has continued engaging in this fraudulent conduct. Is this permissible under 1.16(b)(2), 1.6(b)(3), or 1.6(b)(5)?

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No. CMBA v. Heben, 2017-Ohio-6965

- A 1.6(b)(5) controversy doesn't exist prior to filing a motion to intervene or a fee application; further, the information about the client's fraud exceeds the scope of what's necessary to address this issue.
- 1.6(b)(3) disclosures must be specific, and arise out of the client using your legal advice to facilitate the fraud/illegal conduct. Also, must first seek voluntary cure, and keep narrowly tailored/need to know.
- Also: 1.7 (conflict of interest / current clients)—Can't accept/continue representation of client creating conflict in which you'll be limited in carrying out the representation

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You're negotiating your client's employment contract with a 5-star restaurant. You are surprised his past work experience (which is limited to TGI Fridays) landed him this job until the restaurant sends you the resume he's sent you, which you know contains materially false information about his extensive comparable experience and Parisian culinary training; this clearly influenced the employer's decision to hire him. What do you do?

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Mandatory exceptions (1.6(d))—when reasonably believe necessary to comply with:

- **4.1—Truthfulness in Statements to Others**
 - Lawyer shall not knowingly:
 - Make a false statement of fact or law to 3d person (e.g., witness, opposing counsel)
 - Fail to disclose (ongoing/future) material fact when disclosure is necessary to avoid assisting client's [ongoing] illegal/fraudulent act
 - Under Rule 1.2(d), cannot counsel/assist illegal/fraudulent activity. 4.1 is not limited by 1.6.
 - Sometimes, client can prevent attorney's mandatory disclosure by refraining from wrongful conduct (rendering it past illegal/fraudulent conduct).
 - For past illegal/fraudulent acts, 1.6(b)(3) permits—but does not require—revealing this info when reasonably necessary to mitigate substantial injury to financial/property interests of another. [RPC 4.1; Com. 4]

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Normal vs. Noisy Withdrawal

- If your representation must end to prevent a future fraud (e.g., the client wants you to “go along” with the false resume), this may be a quiet withdrawal.
- Once you have already (unwittingly) engaged in a factual misstatement that perpetuated the fraud (e.g., you lobbied for higher pay because of the client's misstatements—initially unaware they were false), you must first attempt to obtain the client's cooperation in curing, then, if not, you must cure (e.g., disaffirm the statement).

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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. Robert W. Berger
Retired Portage County Probate Court Judge

***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.



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Office

H.B. 339
134th General Assembly

Bill Analysis

Version: As Introduced

Primary Sponsor: Rep. Swearingen

Aida S. Montano, Research Analyst

Andrew Little, Attorney

SUMMARY

Electronic wills

- Permits a will to be executed electronically in addition to current law's requirement that a will must be in writing.
- Requires the following, regarding an electronic will:
 - It must be a "record" that is readable as text at the time it is "signed";
 - It must be signed at the end by the testator or by another individual in the testator's name, in the testator's physical or "electronic presence," and by the testator's direction;
 - It must be signed in the physical or electronic presence of the testator by two or more competent witnesses located in this state, who must sign the will within a reasonable time after witnessing the testator's signing and must subscribe and attest their signatures;
 - If the testator is a vulnerable adult, the witnesses must sign the will in the testator's physical presence;
 - The procedures for executing an electronic will must be recorded by electronic media containing both audio and visual components, the process for such recording must be followed, and the format of the recording must be preserved and stored in a safe, secure, and appropriate manner.
- Defines the following among other terms used in the bill:
 - "Record" means information that is inscribed in a tangible medium or that is stored in an electronic medium and is retrievable in perceivable form;

- “Sign” means to do either of the following with the present intent to authenticate or adopt a record: execute or adopt a tangible symbol, or affix to or logically associate with a record an electronic symbol or process;
- “Electronic presence” means the relationship of two or more individuals in different locations communicating in real time to the same extent as if the individuals were physically present in the same location;
- “Vulnerable adult” means a person who is 18 years of age or older and whose ability to perform daily normal activities or to provide for the person’s own care or protection is impaired due to a mental, emotional, sensory, or long-term physical or developmental disability, brain damage, or the debilitating infirmities of aging.
- Requires a copy of the electronic will to be provided to the testator of that electronic will.
- Provides that on and after the bill’s effective date, Ohio laws applicable to wills apply to electronic wills unless it is clear from the context or meaning of the provision of the law that it applies only to a will in writing or a will other than an electronic will.
- Requires a copy of an electronic will to be deposited by the testator or by some other person for the testator and with the testator’s affidavit authorizing such person to make the deposit, in the office of the probate court judge in the county in which the testator lives, before or after the testator’s death.
- Provides that a document is to be treated as an electronic will if a probate court finds that the proponent of the document as a purported electronic will has established, by clear and convincing evidence, that the decedent prepared the document or caused it to be prepared, signed the document and intended it to constitute the decedent’s will, and the above requirements for making an electronic will are complied with.
- Permits an executor to file an action in the probate court to recover court costs and attorney’s fees from the attorney, if any, responsible for the execution of the document as a purported will upon a finding by the court under the preceding dot point.
- Specifies that an electronic will may be revoked by the testator’s subsequent will revoking all or part of the will expressly or by inconsistency, or by a “physical act” that the testator, with the intent of revoking all or part of the will, performed the act or directed another individual who performed the act in the testator’s physical presence.
- Defines “physical act” as used in the preceding dot point as including the use of a delete or trash function on the computer pertaining to the electronic will or by typing or writing “revoked” on an electronic or printed copy of the electronic will.
- Provides that an oral will, made in the last sickness, is valid in respect to personal property if it is transcribed electronically and subscribed by two competent disinterested witnesses within ten days after the speaking of the testamentary words and who were in the physical or electronic presence of the testator.

- Requires that the witnesses to an oral will who were, at the time the testamentary words were spoken, in the testator's electronic presence be located within this state.
- Requires a complaint in the probate court to have an electronic will declared valid to contain the following statements:
 - That a "copy" (copy of the record of an electronic will that is readable as text) of the will has been filed with the probate court and that the will is an electronic will;
 - That the will was signed at the end by the testator or by another individual in the testator's name, in the testator's physical or electronic presence, and at the testator's express direction;
 - That the will was signed in the physical or electronic presence of the testator by two or more competent individuals and that all of the above requirements for the execution of an electronic will are complied with.

Declaration governing the use or continuation, or the withholding or withdrawal, of life-sustaining treatment

- Permits a declaration governing the use or continuation, or the withholding or withdrawal, of life sustaining treatment to be executed electronically by the declarant or another individual at the declarant's direction by signing the "record" at the end of the declaration, stating the date of its execution, and having it witnessed or acknowledged as follows:
 - The electronic declaration must be witnessed by two individuals with qualifications specified in continuing law and in whose physical or electronic presence the declarant, or another individual at the declarant's direction, signed the declaration;
 - If the declarant is a vulnerable adult, the witnesses must sign the will in the physical presence of the declarant;
 - The electronic declaration must be certified and attested by a notary public through an electronic notarization or as an online notarization under the Ohio Notary Law.

Transfer on death designation affidavit

- Allows a transfer on death designation affidavit to be executed in an electronic manner, provides that a certified copy or a copy of the affidavit that is readable as text must be considered to be a certified copy or a copy of the record of the affidavit, and requires a copy of that affidavit to be offered for recording with the county recorder.

Durable power of attorney for health care

- Permits a durable power of attorney for health care to be executed electronically by which the principal must sign the record associated with, and at the end of, the instrument and state the date of its execution; and requires the instrument to be witnessed by at least two individuals who have the qualifications under continuing law, or are certified and attested by a notary public as follows:

- If the electronic durable power of attorney for health care is witnessed, requires the principal to sign the instrument and acknowledge the signature at the end of the instrument in the physical or electronic presence of each witness;
- If the principal is a vulnerable adult, requires the witnesses to sign the will in the physical presence of the principal;
- If the electronic durable power of attorney is certified and attested, requires a notary public to certify and attest the instrument through an electronic notarization or as an online notarization under the Ohio Notary Law.

Power of attorney

- Allows a power of attorney to be executed electronically by the principal signing the instrument or by another individual directed by the principal to sign the principal's name on the instrument in the electronic presence of the principal.
- Provides that a signature on an electronic power of attorney is presumed to be genuine if the principal or the principal and other individual directed by the principal to sign the principal's name acknowledges the signature before a notary public performing an electronic notarization or an online notarization pursuant to the Ohio Notary Law.

Recording by county recorder

- Provides that an electronic durable power of attorney for health care or an electronic declaration for the continuation or use, or the withholding or withdrawal, of life-sustaining treatment is recorded by presenting a "copy of the declaration" or the electronic durable power of attorney for health care retrieved and copied in readable text.
- Defines "copy of a declaration" as a printed or electronic copy of a declaration in writing, a copy of the record of a declaration executed electronically that is readable as text, or an electronic copy of the record of a declaration executed electronically.

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DETAILED ANALYSIS

Overview

The bill authorizes the execution by electronic means of the following instruments: wills; declarations governing the continuation or use, or the withholding or withdrawal, of life sustaining treatment; transfer on death designation affidavits; durable powers of attorney for health care; and powers of attorney.

Wills Law

The bill expands the law on wills by providing that, unless the context otherwise requires, "will" as used in the Probate Law, includes "electronic wills" and "copies of electronic wills."¹

Current law, not changed by the bill, provides that "will" includes codicils to wills admitted to probate; lost, spoliated, or destroyed wills; and instruments declared valid under the law on declaring a will valid, but "will" does not include inter vivos trusts or other instruments that have not been admitted to probate.²

¹ R.C. 2107.01(A)(1)(d).

² R.C. 2107.01(A).

The bill modifies current law by providing that, except for oral wills *governed by R.C. 2107.60* (see below under “**Validity of oral wills**”), every will must be in writing, including handwritten or typewritten, *or be an electronic will*.³

Electronic wills

How executed

The bill specifies that all of the following apply to an “electronic will:”⁴

1. The will must be a “record” that is readable as text at the time it is “signed” under (2) and (3) below.
2. The will must be signed at the end by the testator or by another individual in the testator’s name, in the testator’s physical or “electronic presence,” and by the testator’s direction.
3. The will must be signed in the physical or electronic presence of the testator by two or more competent witnesses and all of the following apply:
 - a. If the witnesses sign in the electronic presence of the testator, they must be located in Ohio.
 - b. If the testator is a “vulnerable adult,” the witnesses must sign the will in the physical presence of the testator.
 - c. The witnesses must sign the will within a reasonable time after witnessing the signing of the will under (2) above.
 - d. The witnesses must subscribe and attest their signatures to the will.

Recording of procedure for executing an electronic will

The bill requires the procedures described above in “**How executed**” be recorded by electronic media containing both audio and visual components. The format of the recording must be preserved and stored in a safe, secure, and appropriate manner.⁵ The process of recording must ensure the following:⁶

1. That the person executing the electronic will is the testator of the will;
2. That the persons signing the electronic will as described above in “**How executed**” verbally acknowledge that they have signed the electronic will, that they recognize the consequences of their signing the electronic will, and that they understand the significance of the electronic will.

³ R.C. 2107.03(A).

⁴ R.C. 2107.03(C).

⁵ R.C. 2107.03(D)(1).

⁶ R.C. 2107.03(D)(2).

Other provisions

The bill requires that a copy of the electronic will be provided to the testator of that electronic will.⁷

The bill provides that the intent of the testator that the “record” described in (1) above in “**How executed**,” is the testator’s electronic will may be established by extrinsic evidence.⁸

Applicability of current laws

The bill specifies that on and after the bill’s effective date, the laws of Ohio that are applicable to wills apply to electronic wills unless it is clear from the context or meaning of a particular provision of the law that it applies only to a will in writing or a will other than an electronic will. It further specifies that the principles of equity apply to electronic wills.⁹

Definitions

The bill defines the following terms for purposes of its provisions on electronic wills and other electronic instruments covered by the bill:¹⁰

“**Copy of an electronic will**” means a copy of the “record” of an electronic will that is readable as text.

“**Electronic**” or “**electronically**” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

“**Electronic presence**” means the relationship of two or more individuals in different locations communicating in real time to the same extent as if the individuals were physically present in the same location.

“**Electronic will**” means a will that is executed electronically as described above, and includes a copy of an electronic will.

“**Original will**” means the original will in writing or the copy of an electronic will that is offered for or admitted to probate.

“**Record**” means information that is inscribed in a tangible medium or that is stored in an electronic medium and is retrievable in perceivable form.

“**Sign**” means to do either of the following with the present intent to authenticate or adopt a record: (a) execute or adopt a tangible symbol, or (b) affix to or logically associate with a record an electronic symbol or process.

⁷ R.C. 2107.03(E).

⁸ R.C. 2107.03(F).

⁹ R.C. 2107.031.

¹⁰ R.C. 2107.01.

“Vulnerable adult” means a person who is 18 years of age or older and whose ability to perform the normal activities of daily living or to provide for the person’s own care or protection is impaired due to a mental, emotional, sensory, or long-term physical or developmental, disability or dysfunction, or brain damage, or the debilitating infirmities of aging.

“Will annexed” means the original will, a copy of the original will in writing, or a copy of the electronic will, whichever is applicable.

Deposit of copy of will in judge’s office

The bill requires that a copy of an electronic will be deposited by the testator or by some other person for the testator, in the office of the judge of the probate court in the county in which the testator lives, before or after the testator’s death. A copy of such will may be deposited after the testator’s death with or without applying for its probate. If a copy of an electronic will is deposited by some person for the testator, that person must attach with that copy an affidavit attested to by the testator authorizing the person to deposit the copy of the electronic will.¹¹ Every electronic will so deposited must be stored in a separate file in the court’s records and contain information analogous to that required for wills in writing.¹²

Continuing law for wills in writing applies to a deposited electronic will. The will cannot be opened or read until delivered to a person entitled to receive it, until the testator files a complaint in the probate court for a declaratory judgment of the validity of the will pursuant to R.C. 5817.02, or until otherwise disposed of under continuing law’s provisions on delivery of a deposited will, and generally, the deposited will is not a public record until an application is filed to probate it.¹³

Admission of will to probate

Current law requires the probate court to admit a will to probate if it appears from the face of the will or from the testimony of the witnesses to a will that the execution of the will complies with the law in force at the time of its execution in the jurisdiction in which “the testator was physically present when” it was executed, with the law in force in Ohio at the time of the testator’s death, or with the law in force in the jurisdiction in which the testator was domiciled at the time of the testator’s death. The bill removes the clause in quotation marks referring to the law in the jurisdiction in which the testator was physically present.¹⁴

Document purporting to be an electronic will

Under the bill, if a document that is executed that purports to be an electronic will is not executed in compliance with the requirements for executing an electronic will under “**How**

¹¹ R.C. 2107.07(A)(2).

¹² R.C. 2107.07(C).

¹³ R.C. 2107.07(C) and by reference to R.C. 2107.08, not in the bill.

¹⁴ R.C. 2107.18.

executed,” above (hereafter referred to as “electronic will requirements”) that document must be treated as if it had been executed as an electronic will in compliance with those requirements if a probate court, after holding a hearing, finds that the proponent of the document as a purported electronic will has established, by clear and convincing evidence, all of the following:¹⁵

- The decedent prepared the document or caused the document to be prepared.
- The decedent signed the document and intended the document to constitute the decedent’s will.
- The electronic will requirements were complied with.

The executor may file an action in the probate court to recover court costs and attorney’s fees from the attorney, if any, responsible for the execution of the document purporting to be an electronic will if the court holds a hearing as described above and finds that the proponent of the document as a purported electronic will has established by clear and convincing evidence the requirements in the above dot points.¹⁶

Revocation

The bill provides that an electronic will is revoked in the following manner:¹⁷

- By the testator’s subsequent will that revokes all or part of the electronic will expressly or by inconsistency; or
- By a “physical act,” if it is established by a preponderance of the evidence that the testator, with the intent of revoking all or part of the will, performed the act or directed another individual who performed the act in the physical presence of the testator. “Physical act” includes using a delete or trash function on the computer pertaining to the electronic will or typing or writing “revoked” on an electronic or printed copy of the electronic will.

Validity of oral wills

The bill modifies current law by providing that an oral will, made in the last sickness, is valid in respect to personal property if the oral will is reduced to writing *or transcribed electronically* and subscribed within ten days after the speaking of the testamentary words by two competent disinterested witnesses *who were, at the time the testamentary words were spoken, in the physical or electronic presence of the testator. The witnesses who were, at the time the testamentary words were spoken, in the electronic presence of the testator must be located within this state.* The witnesses must prove that the testator was of sound mind and memory, not under restraint, and that the testator called upon some person *physically or*

¹⁵ R.C. 2107.24(B).

¹⁶ R.C. 2107.24(C)(2).

¹⁷ R.C. 2107.33(B).

electronically present at the time the testamentary words were spoken to bear testimony to the disposition as the testator's will.¹⁸

Real or personal property devised, bequeathed, or appointed to trustee of existing trust

In current law authorizing a testator, by will, to devise, bequeath, or appoint property or an interest in property to a trustee of a trust that is evidenced by a written instrument with certain requirements, the bill adds that such trust may be evidenced by an *electronic instrument*, and refers to any amendments or modifications of the trust made in writing *or electronically*.¹⁹

Foreign wills

Under current law, authenticated copies of wills of persons "not domiciled in this state," executed and proved according to the laws of any state or territory of the United States, relative to property in this state, may be admitted to record in the probate court of a county where a part of that property is situated. The recorded authenticated copies are valid as wills made in this state. The bill eliminates the quoted reference to persons "not domiciled in this state."²⁰

Determination of validity of will during testator's lifetime

Current law allows a testator to file a complaint with the probate court to determine before the testator's death that the testator's will is a valid will subject only to its subsequent revocation or modification. Such right to file a complaint or to voluntarily dismiss a filed complaint is personal to the testator.²¹ The bill defines "will" for purposes of the complaint and the court procedures to include an electronic will. It also defines "copy of an electronic will," "electronic presence," "electronic will," and "sign" as in "**Definitions**," above.²²

The bill modifies current law pertaining to some of the contents of a complaint as follows:²³

- A statement that a copy of the *written or electronic* will has been filed with the court.
- A statement that the will is in writing *or is an electronic will*.
- A statement that the will, *if in writing*, was signed by the testator, or was signed in the testator's name by another person in the testator's conscious presence and at the testator's express direction; *or a statement that the will, if an electronic will, was signed*

¹⁸ R.C. 2107.60(A).

¹⁹ R.C. 2107.63.

²⁰ R.C. 2129.05.

²¹ R.C. 5817.02(A), not in the bill.

²² R.C. 5817.01.

²³ R.C. 5817.05(C)(1) to (4).

at the end by the testator or by another individual in the testator's name, in the testator's physical presence or electronic presence, and at the testator's express direction.

- A statement that the will, *if in writing*, was signed in the conscious presence of the testator by two or more competent individuals, each of whom either witnessed the testator sign the will, or heard the testator acknowledge signing the will; *or a statement that the will, if an electronic will, was signed in the physical presence or electronic presence of the testator by two or more competent individuals and that all of the electronic will requirements were complied with.*

Wills in writing

Under continuing law, a will: (a) must be signed at the end by the testator or by some other person in the testator's "conscious presence" and at the testator's express direction, and (b) must be attested and subscribed in the conscious presence of the testator, by two or more competent witnesses, who saw the testator subscribe, or heard the testator acknowledge the testator's signature. "Conscious presence" means within the range of any of the testator's senses, excluding the sense of sight or sound that is sensed by telephonic, electronic, or other distant communication.²⁴ The bill specifies that those requirements apply to a *will in writing*.²⁵

Revocation of will in writing

Under current law as modified by the bill, a will *in writing* is revoked in any of the following manners:²⁶

- By the testator by tearing, canceling, obliterating, or destroying it with the intention of revoking it.
- By some person, at the request of the testator and in the testator's *physical* presence, by tearing, canceling, obliterating, or destroying it with the intention of revoking it.
- By some person tearing, canceling, obliterating, or destroying it pursuant to the testator's express written direction.
- By some other written will or codicil *or by an electronic will*, executed as prescribed by the Wills Law, including the electronic will provisions.
- By some other writing that is signed, attested, and subscribed in the manner provided by the Wills Law.

²⁴ R.C. 2107.03(B).

²⁵ *Id.*

²⁶ R.C. 2107.33(A).

Miscellaneous changes

Depositions by commission

Under current law, when a witness to a will, or other witness competent to testify is unable to attend court because the witness resides outside of the court's jurisdiction, or resides within it but is infirm and unable to attend court, the probate court may issue a commission with the will annexed directed to any suitable person. In lieu of the original will, the probate court may annex to the commission a photocopy of the will or a copy of the will made by any similar process.²⁷ Under the bill, the court may annex to the commission a photocopy of the *original* will (as defined under "**Definitions**," above) or a copy of *that* will made by a similar process.²⁸

Court record distinguished from "record" in electronic wills

Some provisions in the Wills Law use the term "record" in the context of a court record. The bill clarifies the use of the term "record" in those provisions by specifying "court record" to distinguish that phrase from "record" as defined and used in the electronic will requirements.²⁹

Declaration governing the use or continuation, or the withholding or withdrawal, of life-sustaining treatment

Continuing law permits an adult who is of sound mind voluntarily to execute at any time a declaration governing the use or continuation, or the withholding or withdrawal, of life-sustaining treatment (hereafter referred to as "declaration").³⁰ The bill expands the definition of "declaration" to include an electronic document executed under the law governing declarations.³¹ For purposes of that law, it defines "copy of a declaration" as a printed or electronic copy of a declaration in writing, a copy of the record of a declaration executed electronically that is readable as text, or an electronic copy of the record of a declaration executed electronically.³² The bill also defines "electronic," "electronically," "electronic presence," "record," "sign," and "vulnerable adult" as in "**Definitions**" above.³³

The bill modifies current law as follows:

- *If the declaration is in writing*, it must be signed at the end by the declarant or by another individual at the declarant's direction and state the date of its execution. *If the declaration is executed electronically, the declarant or another individual at the direction*

²⁷ R.C. 2107.17.

²⁸ *Id.*

²⁹ R.C. 2107.29, 2107.30, and 2107.31.

³⁰ R.C. 2133.02(A)(1).

³¹ R.C. 2133.01(F).

³² R.C. 2133.01(D) and (CC).

³³ R.C. 2133.01(DD).

*of the declarant must sign the record associated with, and at the end of, the declaration, and state the date of its execution. The declaration may either be witnessed or acknowledged.*³⁴

- If witnessed, a declaration must be witnessed by two individuals in whose *physical presence, if the declaration is in writing, or physical or electronic presence, if the declaration is executed electronically*, the declarant, or another individual at the direction of the declarant, signed the declaration. *The witnesses to a declaration that is executed electronically in the electronic presence of the declarant or another individual at the direction of the declarant must be located within this state. The witnesses to a declaration that is executed electronically by a declarant who is a vulnerable adult or by another individual at the direction of a declarant who is a vulnerable adult must sign the declaration in the physical presence of the declarant.* Each witness must subscribe the witness's signature after the signature of the declarant or other individual at the direction of the declarant and thus, attest to the witness's belief that the declarant appears to be of sound mind and not under or subject to duress, fraud, or undue influence. Continuing law specifies who may or may not be witnesses.³⁵
- If acknowledged, a declaration must be acknowledged before a notary public, who must make the appropriate certification and must attest that the declarant appears to be of sound mind and not under or subject to duress, fraud, or undue influence. *If a declaration is executed electronically, a notary public performing the certification and attestation must do so through an electronic notarization or as an online notarization pursuant to the Ohio Notary Law.*³⁶

Transfer on death designation affidavit

Generally, continuing law permits a real property owner to designate the property or an interest in the property as transferable on death to a designated beneficiary or beneficiaries by executing a transfer on death designation affidavit.³⁷

The bill specifies that a transfer on death designation affidavit may be executed in writing or in an electronic manner. If executed in an electronic manner, a certified copy or a copy of the affidavit that is readable as text is considered to be a certified copy or a copy of the record of the affidavit. A copy of that affidavit must be offered for recording with the county recorder as provided in the law on transfer on death designation affidavits.³⁸

³⁴ R.C. 2133.02(A)(1).

³⁵ R.C. 2133.02(B)(1).

³⁶ R.C. 2133.02(B)(2).

³⁷ R.C. 5302.22(B).

³⁸ R.C. 5302.22(B).

Durable power of attorney for health care

Continuing law permits an adult who is of sound mind to voluntarily execute a durable power of attorney for health care that authorizes an attorney in fact to make health care decisions for the principal when the principal's attending physician determines that the principal has lost the capacity to make such informed health care decisions.³⁹

The bill modifies current law on the execution of a durable power of attorney for health care by providing the following:

- If a durable power of attorney for health care is in writing, it must be signed at the end of the instrument by the principal and state the date of its execution. If a durable power of attorney for health care is executed electronically, the principal must sign the record associated with, and at the end of, the instrument and state the date of its execution. The instrument must either be witnessed or be acknowledged by the principal.⁴⁰
- The witnessing of a durable power of attorney for health care involves the principal signing of the *applicable instrument* (i.e., the written or the electronic instrument), or acknowledging the principal's signature, at the end of the instrument in the *physical* presence or *electronic presence, as applicable*, of each witness. *A witness for a durable power of attorney for health care that is electronically executed may be in either the physical or electronic presence of the principal. A witness for a durable power of attorney for health care that is executed electronically in the electronic presence of the principal must be located within this state. A witness for a durable power of attorney for health care that is executed electronically by the principal who is a vulnerable adult must sign such durable power of attorney in the physical presence of the principal.* Each witness must subscribe the witness's signature after the principal's signature of the principal and thus, attest to the witness's belief that the principal appears to be of sound mind and not under or subject to duress, fraud, or undue influence.⁴¹
- If acknowledged, a durable power of attorney for health care must be acknowledged before a notary public who must make the appropriate certification and attest that the principal appears to be of sound mind and not under or subject to duress, fraud, or undue influence. *If the durable power of attorney for health care is executed electronically, the notary public performing the certification and attestation must do so through an electronic notarization or as an online notarization under the Ohio Notary Law.*⁴²

Under the bill, a durable power of attorney for health care executed electronically may include some or all of the information specified in the printed form of the instrument in

³⁹ R.C. 1337.12(A)(1).

⁴⁰ R.C. 1337.12(A)(1)(a) and (b).

⁴¹ R.C. 1337.12(B).

⁴² R.C. 1337.12(C).

R.C. 1337.17 according to the intention of the principal. The record of an electronic durable power of attorney for health care may be retrieved and copied in readable text.⁴³

The bill defines “electronic,” “electronically,” “electronic presence,” “record,” “sign,” and “vulnerable adult” as in “**Definitions**,” above.⁴⁴

Power of attorney

The bill modifies current law by providing that a power of attorney must be signed by the principal or in the principal’s conscious presence *or electronic presence* by another individual directed by the principal to sign the principal’s name on the power of attorney. A signature on a power of attorney is presumed to be genuine if the principal *or the principal and other individual directed by the principal to sign the principal’s name* acknowledges the signature before a notary public or other individual authorized by law to take acknowledgments.⁴⁵

The bill provides that if a power of attorney is executed electronically, the principal’s signature must only be acknowledged before a notary public performing an electronic notarization or an online notarization pursuant to the Ohio Notary Law.⁴⁶

The bill defines “conscious presence” as in “**Wills in writing**,” above, and “electronic presence” as in “**Definitions**,” above.⁴⁷

Recording by county recorder

The bill provides that a declaration governing the use or continuation, or the withholding or withdrawal, of life-sustaining treatment, if electronically executed, is recorded by presenting a “copy of a declaration” to the county recorder; and an electronic durable power of attorney for health care is recorded by presenting that instrument retrieved and copied in readable text as described above under “**Durable power of attorney for health care**.”⁴⁸

“Copy of a declaration” has the same meaning as under “**Declaration governing the use or continuation, or the withholding or withdrawal, of life-sustaining treatment**,” above.⁴⁹

⁴³ R.C. 1337.121.

⁴⁴ R.C. 1337.11(DD).

⁴⁵ R.C. 1337.25(A).

⁴⁶ R.C. 1337.25(B).

⁴⁷ R.C. 1337.22(O) and (P).

⁴⁸ R.C. 317.32(I).

⁴⁹ *Id.*

HISTORY

Action	Date
Introduced	06-07-21

DRAFT -- PENDING APPROVAL

R.C. 2107.03 Method of making a will.

Except oral wills, every will shall be in writing, but may be handwritten or typewritten. The will shall be signed at the end by the testator or by some other person in the testator's conscious presence and at the testator's express direction. The will shall be attested by the signatures, and subscribed in the conscious presence of the testator, by two or more witnesses, who saw the testator subscribe, or heard the testator acknowledge the testator's signature.

For purposes of this section, "in writing" means a record that is readable as text at the time of signing. "Signed" and "subscribed" with respect to the testator and witnesses includes an electronic signature described in the Uniform Electronic Transactions Act, sections 1306.01 to 1306.23 of the Revised Code. "[C]onscious presence" means within the range of any of the testator's senses, excluding the sense of sight or sound that is sensed by telephonic, electronic, or distant communication. "Record" has the meaning in division (M) of section 1306.01.

New R.C. 2107.031 Pertaining to electronic wills.

(A) Definition. For purposes of this chapter, an "electronic will" shall mean an electronic record that complies with section 2107.03. "Electronic record" has the same meaning in division (G) of section 1306.01. Unless a more specific provision of this chapter applies to an electronic will, the term "will" as used in the Revised Code shall also mean an electronic will.

(B) Recognition. The law of this state applicable to wills and principles of equity apply to an electronic will, except as otherwise specifically provided in this chapter.

(C) Revocation. An electronic will may revoke all or part of a previous will. All or part of an electronic will is revoked by: (1) a subsequent will that revokes all or part of the electronic will expressly or by inconsistency; or (2) a physical act, if it is established by a preponderance of the evidence that the testator, with the intent of revoking all or part of the will, performed the act or directed another individual who performed the act in the testator's physical presence. The manners of revocation in division (A) of section 2107.33 shall not govern revocation of an electronic will, however, divisions (B) through (F) of section 2107.33 shall apply to electronic wills.

(D) Presentation to Probate Court. Unless otherwise permitted by local probate court rule in the county in which deposit, presentation, or filing is sought, only a certified paper copy of an electronic will may be presented for deposit in accordance with section 2107.07, presented for probate in accordance with section 2107.18, or filed by the testator to declare its validity in accordance with section 5817.02. An individual shall create a certified paper copy of an electronic will by affirming under penalty of perjury that a paper copy of the electronic will is a complete, true, and accurate copy of the electronic will. A certified paper copy of the electronic will must be a record that is readable as text.

DRAFT -- PENDING APPROVAL

(E) Certification of Paper Copy. A certification used to create a certified paper copy of an electronic will may be created using the following words, “Under penalty of perjury, I certify that the attached is a complete, true, and accurate copy of the electronic record identified by it,” or substantially similar language. A certification must be signed by the person making it but need not be witnessed or acknowledged.

R.C. 1306.02 Scope of chapter - exceptions.

(A) Except as provided in division (B) of this section, sections 1306.01 to 1306.23 of the Revised Code apply to electronic records and electronic signatures relating to a transaction.

(B) Sections 1306.01 to 1306.23 of the Revised Code do not apply to a transaction to the extent it is governed by ~~any of the following:~~

- ~~(1) A law governing the creation and execution of wills, codicils, or testamentary trusts;~~
- ~~(2) Chapter 1301., except section 1301.306, and Chapters 1303., 1304., 1305., 1307., 1308., and 1309. of the Revised Code.~~

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 1 grandson.

“CHANGES”

NAME CHANGE	RC 2717
NAME CONFORMITY	RC 2717.04, RC 2717.05
BIRTH CORRECTIONS	RC 3705.22
REGISTRATION OF UNRECORDED BIRTH	RC 3705.15

GENDER MARKER CHANGES

Ray v McCloud, 2:18=CV-272 (12-16-2020)

In the Matter of Marisa Burdette McBride Case No: 034366 Crawford County

JUDGE THOMAS M. BARONZZI

Name Change, Name Conformity or Birth Certificate Correction: Which process is right for my situation?

Change of Name

- I want to change all or part of my name to a new name
- I want to ~~change~~ change all or part of my child's name
- I want to change my last name and I did not recently get married
- I want to restore my maiden name following a divorce and I did not choose to do it when the divorce was pending

Name Conformity

- My name does not match on one or more of my official identity documents (Birth Certificate, Social Security Card, Driver's License, Passport, Marriage Certificate or Divorce Decree)
- An inconsistency in my name is prohibiting me from getting a driver's license
- I was not born in Ohio, and I have an error or misspelling on my birth certificate
- My child was not born in Ohio and has an error or misspelling on their birth certificate
- I was born in Ohio, but the name on my birth certificate doesn't match the name I have used all of my life
- I was in a common law marriage with no marriage certificate to document my name change
- The name I currently use is a name on one or more of my official identity documents

Birth Correction

- I was born in Ohio and I have an error or misspelling on my birth certificate
- I was born in Ohio and one of my parent's names is misspelled or my birth date is incorrect on my birth certificate
- My child was born in Ohio and one of the names is misspelled or the birth date is incorrect on my child's birth certificate
- The error on my or my child's birth certificate is a true error, not a desired change or alternate spelling acquired following birth

Situations Probate Court Cannot Correct

- I want to add or remove a parent from my child's birth certificate
- I want to add or remove a parent from my birth certificate
- I want paternity testing to prove the father on my child's birth certificate is not the biological father
- I was married at the time my child was born, but my husband is not my child's biological father and I want to correct my child's birth certificate

If the situation regarding your name is not referenced in one of these sections, you should contact the Probate Court or an Attorney before commencing any legal action regarding your name. The situations described that Probate Court cannot correct are generally matters outside of Probate Court's jurisdiction. It is recommended that you contact the Ohio Department of Health or an Attorney to assist you in these types of situations.

Example 1. A person was born in Ohio and there is a mistake on their birth record ("Dean" was mistakenly spelled "Daen"). You can use a birth record correction under 3705.15 to fix that typo. Therefore, you have to use the birth record correction and not the name conformity. (It is faster and easier to do that anyway, in most cases.)

Example 2. Same facts as Example 1, except the person was NOT born in Ohio. Now, you cannot use the birth record correction because that is only available if born in Ohio. In that case, you can use the name conformity procedure – you are not using it "in lieu of" a birth record correction since a birth record correction was not available.

Example 3. Lady was born in Ohio with a first name "Angelica". But she over time shortened it on all of her other official identity documents to "Angela". You technically cannot use the birth record correction under 3705.15 because "Angelica" was not a MISTAKE, she just took the assumed name "Angela" afterwards. Therefore, you could use a name conformity in this instance because the birth record correction is not an available remedy.

Local Rule 78.6 Name Change and Name Conformity Proceedings

This Rule governs name change and name conformity proceedings under R.C. Chapter 2717.

A. Choosing the Correct Proceeding

A name change proceeding, name conformity proceeding and birth record correction proceeding serve ~~different~~ purposes. Each action has its own requirements. The Court will determine if the application is the appropriate procedure to accomplish the person's intent based on the circumstances.

A name change proceeding seeks to change all or part of a person's name to a different name going forward.

A name conformity proceeding is solely to correct misspellings, inconsistencies or errors on one or more official identity documents evidencing a person's current legal name. A name conformity corrects errors that occurred in the past. It does not change a person's name, but merely identifies conflicting problems in their official identity documents and corrects those problems by a Court Order so that all of the person's official identity documents are consistent and conformed to prove the applicant's chain of identity and reflect the legal name the person currently uses.

A birth record correction proceeding only corrects clerical errors in the birth record of a person who was born in Ohio. A birth record correction proceeding may not be substituted for a name change proceeding or name conformity proceeding.

B. Documentation Requirements on Name Change Proceedings

An applicant seeking a name change must provide photocopies of the following documents relating to the applicant or minor with the application:

- Birth Certificate
- Social Security Card
- Driver's License or State issued ID Card (if any)

Upon review of the application, the Court may order the submission of other documents the Court deems relevant to the application.

The applicant must redact (black out) social security numbers, driver's license numbers, and driver's license issuance and expiration dates on all documents submitted to protect the privacy and confidential information of the applicant or minor.

C. Documentation Requirements on Name Conformity Proceedings

An applicant seeking to conform a legal name must provide photocopies of all official identity documents relating to the applicant or minor with the application, including:

- Birth Certificate
- Social Security Card
- Driver's License or State issued ID Card (if any)
- Marriage Record (if any)

- Divorce Decree (if any)
- Passport (if any)
- All other documents for which name conformity is sought

Upon review of the application, the Court may order the submission of other documents the Court deems relevant to the application.

The applicant must redact (black out) social security numbers, driver's license numbers, and driver's license issuance and expiration dates on all documents submitted to protect the privacy and confidential information of the applicant or minor.

D. Hearings on Adult Name Change and Adult Name Conformity Proceedings

Generally, the Court will not require a hearing and will dispense with notice on an adult name change or an adult name conformity proceeding. The Court may require a hearing if the Court determines that the application presents any irregularities or issues, or if the Court determines that the legal interests of another party may be affected by the proceeding. If the Court requires a hearing, it will determine the manner, scope and content of the hearing notice. The applicant is responsible for serving the hearing notice.

E. Hearings on Minor Name Change and Minor Name Conformity Proceedings

In uncontested name change proceedings and name conformity proceedings for a minor in which the consent of both natural parents of the minor is filed simultaneously with the application, the Court generally will not require a hearing and will dispense with notice.

If an application for name change of a minor or application to conform name of a minor is filed without the written consent of both natural or adoptive parents, or if the Court determines that the application presents any irregularities or issues, the Court will schedule the application for a hearing. Notice of the hearing will comply with paragraph F of this Rule. The applicant must appear at the hearing. The minor may attend the hearing, but is not required to be present unless the Court orders otherwise.

F. Service of Notice on Minor Name Changes and Minor Name Conformity Proceedings

Any parent or alleged father who has not consented to a minor's name change or name conformity will be served by the Court with notice of the hearing pursuant to Civ. R. 73. If a parent or alleged father's whereabouts are unknown, the Court will require the applicant to publish notice of the hearing, at the applicant's expense, to the parent or alleged father who has not consented in a newspaper of general circulation in Greene County, one time at least 30 days before the hearing. The applicant must file proof of publication of the notice with the Court no later than five Calendar Days before the date of hearing on the application.

G. Contested Proceedings

If any name change proceeding or name conformity proceeding becomes contested, the Court will convert the scheduled hearing date to a pretrial conference, during which the Court will set a new hearing date. At the pretrial conference, the Court will determine whether to excuse a minor who is the subject of the action from appearing at the hearing and whether the Court will conduct an *in camera* interview of the minor before the hearing. The applicant and the person contesting the application must attend the pretrial conference personally or through their legal counsel.

H. Confidentiality

If an applicant for a name change or name conformity desires the proceeding and the record to be confidential, the applicant must file a request for confidentiality supported by an affidavit or other sufficient proof that notice of the hearing or public access to the record would jeopardize the applicant's personal safety. A proposed entry must accompany the request. If the Court grants the applicant's request, the Court will waive notice and permanently seal the file.

Checklist

Name Change of Adult

Filing Fees

Court Costs: \$100.00

Requirements

You may apply for a name change **only** if you have been a Greene County Resident for the past 60 days.

The Process

The documents listed below must be prepared by the applicant or an attorney, and submitted to the Court for filing, along with the filing fee. Once the documents have been approved for filing by the Court, the Court will review the filing for approval. Copies of the Judgment Entry will be mailed to the applicant after approval.

The Court reserves the right to require additional documentation be submitted to support the applicant's name change, require a criminal background check, or hold a formal hearing on the application.

Note: *All paperwork must be typed. We will not accept handwritten documents.
All filings must be single-sided. We will not accept double-sided originals.
Please do not staple original paperwork. We cannot accept filings with staples.
You must list the individual's full name on all paperwork (first, middle and last). No initials may be used.*

Initial Filing

- ☐ Self-Representation Acknowledgment (GC Form 75.1) *If applicable*
 - This form **must** be filed if applicant is not represented by an attorney.
- ☐ Contact Information Form (GC Form 75.3-A)
- ☐ Application for Change of Name of Adult (Form 21.0)
- ☐ Photocopy of Birth Certificate
- ☐ Photocopy of Driver's License or State ID (driver's license number, issuance date and expiration date must be redacted)
- ☐ Photocopy of Social Security Card (social security number must be redacted)
- ☐ Affidavit in Support of Application for Change of Name of Adult (Form 21.01)
 - This must be notarized by a Notary Public before being submitted for filing (Court staff cannot notarize documents)
- ☐ Judgment Entry Changing Name of Adult (Form 21.1)

If Requesting the Name Change to be Confidential:

The law requires very specific criteria be met in order for someone to qualify for a confidential name change. The applicant must provide proof that it would jeopardize the applicant's personal safety to have the name change on the public record. Please refer to Ohio Revised Code section 2717.11 to determine if you meet the requirements.

In addition to the forms required for *initial filing* above, the documents listed below must also be submitted, along with any required attachments. The Judge will review all of the documents and make a determination as to whether it qualifies as a confidential name change. If so, the Court will contact the applicant or attorney to set a hearing, if determined necessary.

- ☐ Motion for Confidentiality of Proceeding (Form 21.6)
- ☐ Order Granting Confidentiality of Proceeding (Form 21.06)

Checklist

Name Change of Minor

Filing Fees

Court Costs: \$100.00

* Additional costs may be incurred for certified mail service or publication

Requirements

You may apply for a name change **only** if the minor has been a Greene County resident for the past 60 days.

The Process

The documents listed below must be prepared by the applicant or attorney, and submitted to the Court for filing, along with the filing fee. Once the documents have been approved for filing by the Court, the Court will do one of the following:

- If **both natural parents' consent are provided**, the Court may dispense with a hearing and make a ruling on the application. Copies of the Judgment Entry will be mailed to the applicant upon approval.
- If **both natural parents' consent are not provided**, the Court will set the application for a formal in-person hearing. The applicant will be required to appear. The non-consenting parent will be served with notice of the hearing.

All hearings are set approximately 6 weeks from the date of filing. The Court will issue a Judgment Entry Setting Hearing and Ordering Notice, directing how service on the non-consenting parent will be performed.

- If the non-consenting parent is to be served by certified mail, the Court will issue service;
- In the non-consenting parent will be served by publication, personal service or other method of service pursuant to Civ. R. 73, the applicant will be responsible for taking the notice to a newspaper of general circulation in Greene County for publication, or making arrangements for other service as directed pursuant to the Judgment Entry Setting Hearing and Ordering Notice. Proof of service must be filed with the Court at least 7 days prior to the hearing.

The Court reserves the right to require additional documentation be submitted to support the name change, require a criminal background check, or hold a formal hearing on the application.

Note: *All paperwork must be typed. We will not accept handwritten documents.*

All filings must be single-sided. We will not accept double-sided originals.

Please do not staple original paperwork. We cannot accept filings with staples.

You must list the individual's full name on all paperwork (first, middle and last). No initials may be used.

Initial Filing

- ☐ Self-Representation Acknowledgment (GC Form 75.1) *If applicable*
 - This form **must** be filed if applicant is not represented by an attorney.
- ☐ Contact Information Form (GC Form 75.3-A)
- ☐ Application for Change of Name of Minor (Form 21.2)
- ☐ Photocopy of minor's Birth Certificate
- ☐ Photocopy of minor's Driver's License or State ID (if any) (driver's license number, issuance date and expiration date must be redacted)
- ☐ Photocopy of minor's Social Security Card (social security number must be redacted)
- ☐ Affidavit in Support of Application for Change of Name of Minor (Form 21.02)
 - This must be notarized by a Notary Public before being submitted for filing (Court staff cannot notarize documents)
- ☐ Judgment Entry Changing Name of Minor (Form 21.3)
- ☐ Waiver of Notice of Hearing and Consent to Change of Name of Minor (Form 21.4)
 - Both parents of the minor must sign this waiver to dispense with a hearing on the application

If the both parents' consents are not provided with the application, the following must be filed:

- ☐ Judgment Entry Setting Hearing and Ordering Notice (Form 21.03)
- ☐ Notice of Hearing on Change of Name (Form 21.5)

If Requesting the Name Change to be Confidential:

The law requires very specific criteria be met in order for someone to qualify for a confidential name change. The applicant must provide proof that it would jeopardize the applicant's or minor's personal safety to have the name change on the public record. Please refer to R.C. 2717.11 to determine if you meet the requirements.

In addition to the forms required for *initial filing* above, the documents listed below must also be submitted, along with any required attachments. The Judge will review all of the documents and make a determination as to whether it qualifies as a confidential name change. If so, the Court will contact the applicant or attorney to set a hearing, if determined necessary.

- ☐ Motion for Confidentiality of Proceeding (Form 21.6)
- ☐ Order Granting Confidentiality of Proceeding (Form 21.06)

Checklist

Conforming a Legal Name of an Adult

Filing Fees

Court Costs: \$100.00

Requirements

An application to conform a legal name is a special proceeding separate from a name change. It is solely to correct misspellings, inconsistencies or ~~errors~~ on ~~one~~ or more official identity documents evidencing a person's current legal name.

You may apply to conform a legal name **only** if you have been a Greene County Resident for the past 60 days.

The Process

The documents listed below must be prepared by the applicant or an attorney, and submitted to the Court for filing, along with the filing fee. Once the documents have been approved for filing by the Court, the Court will review the filing for approval. Copies of the Judgment Entry will be mailed to the applicant.

The Court reserves the right to require additional documentation be submitted to support the application to conform a legal name, require a criminal background check, or hold a formal hearing on the application.

Note: *All paperwork must be typed. We will not accept handwritten documents.
All filings must be single-sided. We will not accept double-sided originals.
Please do not staple original paperwork. We cannot accept filings with staples.
You must list the individual's full name on all paperwork (first, middle and last). No initials may be used.*

Initial Filing

- ☐ Self-Representation Acknowledgment (GC Form 75.1) *If applicable*
 - o This form **must** be filed if applicant is not represented by an attorney.
- ☐ Contact Information Form (GC Form 75.3-A)
- ☐ Application to Conform Legal Name of Adult (Form 21.7)
- ☐ Photocopies of the following documents are required to be submitted with the application:
 - o Birth Certificate
 - o Driver's License/State ID Card (driver's license number, issuance date and expiration date must be redacted)
 - o Social Security Card (social security number must be redacted)
 - o Marriage Record (if any)
 - o Divorce Decree (if any)
 - o Passport (if any)
 - o Any identity document relating to the application to conform legal name
- ☐ Affidavit in Support of Application to Conform Legal Name of Adult (Form 21.07)
 - o This must be notarized by a Notary Public before being submitted for filing (Court staff cannot notarize documents)
- ☐ Judgment Entry Conforming Legal Name of Adult (Form 21.8)
 - o If more than one document needs to be conformed, a separate Judgment Entry must be provided for each document

If Requesting the Name Conformity to be Confidential:

The law requires very specific criteria be met in order for someone to qualify for a confidential name conformity. The applicant must provide proof that it would jeopardize the applicant's personal safety to have the name conformity on the public record. Please refer to R.C. 2717.11 to determine if you meet the requirements.

In addition to the forms required for *initial filing* above, the documents listed below must also be submitted, along with any required attachments. The Judge will review all of the documents and make a determination as to whether it qualifies as a confidential name conformity. If so, the Court will contact the applicant or attorney to set a hearing, if determined necessary.

- ☐ Motion for Confidentiality of Proceeding (Form 21.6)
- ☐ Order Granting Confidentiality of Proceeding (Form 21.06)

Checklist

Conforming a Legal Name of a Minor

Filing Fees

Court Costs: \$100.00

* Additional costs may be incurred for certified mail service or publication

Requirements

An application to conform a legal name is a special proceeding separate from a name change. It is solely to correct misspellings, inconsistencies or errors on one or more official identity documents evidencing a person's current legal name.

You may apply for a name conformity **only** if the minor has been a Greene County resident for the past 60 days.

The Process

The documents listed below must be prepared by the applicant or attorney, and submitted to the Court for filing, along with the filing fee. Once the documents have been approved for filing by the Court, the Court will do one of the following:

- If **both natural parents' consent are provided**, the Court may dispense with a hearing and make a ruling on the application. Copies of the Judgment Entry will be mailed to the applicant upon approval.
- If **both natural parents' consent are not provided**, the Court will set the application for a formal in-person hearing. The applicant will be required to appear. The non-consenting parent will be served with notice of the hearing.

All hearings are set approximately 6 weeks from the date of filing. The Court will issue a Judgment Entry Setting Hearing and Ordering Notice, directing how service on the non-consenting parent will be performed.

- If the non-consenting parent is to be served by certified mail, the Court will issue service;
- In the non-consenting parent will be served by publication, personal service or other method of service pursuant to Civ. R. 73, the applicant will be responsible for taking the notice to a newspaper of general circulation in Greene County for publication, or making arrangements for other service as directed pursuant to the Judgment Entry Setting Hearing and Ordering Notice. Proof of service must be filed with the Court at least 7 days prior to the hearing.

The Court reserves the right to require additional documentation be submitted to support the name conformity, require a criminal background check, or hold a formal hearing on the application.

Note: *All paperwork must be typed. We will not accept handwritten documents.
All filings must be single-sided. We will not accept double-sided originals.
Please do not staple original paperwork. We cannot accept filings with staples.
You must list the individual's full name on all paperwork (first, middle and last). No initials may be used.*

Initial Filing

- ☐ Self-Representation Acknowledgment (GC Form 75.1) *If applicable*
 - This form **must** be filed if applicant is not represented by an attorney.
- ☐ Contact Information Form (GC Form 75.3-A)
- ☐ Application to Conform Legal Name of Minor (Form 21.9)
- ☐ Photocopies of the following documents for the minor are required to be submitted with the application:
 - Birth Certificate
 - Driver's License/State ID Card (if any) (driver's license number, issuance date and expiration date must be redacted)
 - Social Security Card (social security number must be redacted)
 - Passport (if any)
 - Any identity document relating to the application to conform legal name
- ☐ Affidavit in Support of Application to Conform Legal Name of Minor (Form 21.09)
 - This must be notarized by a Notary Public before being submitted for filing (Court staff cannot notarize documents)
- ☐ Judgment Entry Conforming Legal Name of Minor (Form 21.10)
 - If more than one document needs to be conformed, a separate Judgment Entry must be provided for each document
- ☐ Waiver of Notice of Hearing and Consent to Conform Legal Name of Minor (Form 21.12)
 - Both parents of the minor must sign this waiver to dispense with a hearing on the application

If the both parents' consents are not provided with the application, the following must be filed:

- ☐ Judgment Entry Setting Hearing and Ordering Notice (Form 21.11)
- ☐ Notice of Hearing on Conforming Legal Name (Form 21.13)

If Requesting the Name Conformity to be Confidential:

The law requires very specific criteria be met in order for someone to qualify for a confidential name conformity. The applicant must provide proof that it would jeopardize the applicant's or minor's personal safety to have the name conformity on the public record. Please refer to R.C. 2717.11 to determine if you meet the requirements.

In addition to the forms required for *initial filing* above, the documents listed below must also be submitted, along with any required attachments. The Judge will review all of the documents and make a determination as to whether it qualifies as a confidential name conformity. If so, the Court will contact the applicant or attorney to set a hearing, if determined necessary.

- ☐ Motion for Confidentiality of Proceeding (Form 21.6)
- ☐ Order Granting Confidentiality of Proceeding (Form 21.06)



Ohio Revised Code

Section 3705.22 Birth certificate to be amended to correct errors.

Effective: March 16, 1989

Legislation: House Bill 790 - 117th General Assembly

Whenever it is alleged that the facts stated in any birth, fetal death, or death record filed in the department of health are not true, the director may require satisfactory evidence to be presented in the form of affidavits, amended records, or certificates to establish the alleged facts. When established, the original record or certificate shall be supplemented by the affidavit or the amended certificate or record information.

An affidavit in a form prescribed by the director shall be sworn to by a person having personal knowledge of the matter sought to be corrected. Medical certifications contained on fetal death or death records may be corrected only by the person whose name appears on the original record as attending physician or by the coroner of the county in which the death occurred.

The amended birth record shall be signed by the person who attended the birth and the informant or informants whose names appear on the original record. The amended death or fetal death record shall be signed by the physician or coroner, funeral director, and informant whose names appear on the original record.

An affidavit or amended record for the correction of the given name of a person shall have the signature of the person, if the person is age eighteen or older, or of both parents if the person is under eighteen, except that in the case of a child born out of wedlock, the mother's signature will suffice; in the case of the death or incapacity of either parent, the signature of the other parent will suffice; in the case of a child not in the custody of his parents, the signature of the guardian or agency having the custody of the child will suffice; and in the case of a child whose parents are deceased, the signature of another person who knows the child will suffice.

Once a correction or amendment of an item is made on a vital record, that item shall not be corrected or amended again except on the order of a court of this state or the request of a court of another state or jurisdiction.



The director may refuse to accept an affidavit or amended certificate or record that appears to be submitted for the purpose of falsifying the certificate or record.

A certified copy of a ~~certificate~~ or record issued by the department of health shall show the information as originally given and the corrected information, except that an electronically produced copy need indicate only that the certificate or record was corrected and the item that was corrected.



Ohio Revised Code

Section 3705.15 Registration of unrecorded birth - correction of birth record.

Effective: June 3, 2014

Legislation: House Bill 95 - 130th General Assembly

Whoever claims to have been born in this state, and whose registration of birth is not recorded, or has been lost or destroyed, or has not been properly and accurately recorded, may file an application for registration of birth or correction of the birth record in the probate court of the county of the person's birth or residence or the county in which the person's mother resided at the time of the person's birth. If the person is a minor the application shall be signed by either parent or the person's guardian.

(A) An application to correct a birth record shall set forth all of the available facts required on a birth record and the reasons for making the application, and shall be verified by the applicant. Upon the filing of the application the court may fix a date for a hearing, which shall not be less than seven days after the filing date. The court may require one publication of notice of the hearing in a newspaper of general circulation in the county at least seven days prior to the date of the hearing. The application shall be supported by the affidavit of the physician or certified nurse-midwife in attendance. If an affidavit is not available, the application shall be supported by the affidavits of at least two persons having knowledge of the facts stated in the application, by documentary evidence, or by other evidence the court deems sufficient.

The probate judge, if satisfied that the facts are as stated, shall make an order correcting the birth record, except that in the case of an application to correct the date of birth, the judge shall make the order only if any date shown as the date the attending physician or certified nurse-midwife signed the birth record or the date the local registrar filed the record is consistent with the corrected date of birth. If supported by sufficient evidence, the judge may include in an order correcting the date of birth an order correcting the date the attending physician or certified nurse-midwife signed the birth record or the date the local registrar filed the record.

(B) An application of a person whose registration of birth is not recorded, or has been lost or destroyed, must comply with division (A) of this section. Upon the filing of the application the court may fix a date for a hearing, which shall be not less than seven days after the filing date. The



court may require one publication of notice of the hearing in a newspaper of general circulation in the county at least seven days prior to the date of the hearing. The probate judge, or a special master commissioner, shall personally examine the applicant in open court and shall take sworn testimony on the application which shall include the testimony of at least two credible witnesses, or clear and convincing documentary evidence. The probate court may conduct any necessary investigation, and shall permit the applicant and all witnesses presented to be cross-examined by any interested person, or by the prosecuting attorney of the county. When a witness or the applicant is unable to appear in open court, the court may authorize the taking of the witness's or applicant's deposition. The court may cause a complete record to be taken of the hearing, shall file it with the other papers in the case, and may order the transcript of the testimony to be filed and made a matter of record in the court. Upon being satisfied that notice of the hearing on the application has been given by publication, if required, and that the claim of the applicant is true, the court shall make a finding upon all the facts required on a birth record, and shall order the registration of the birth of the applicant. The court shall forthwith transmit to the director of health a certified summary of its finding and order, on a form prescribed by the director, who shall file it in the records of the central division of vital statistics.

(C) The director may forward a copy of the summary for the registration of a birth in the director's office to the appropriate local registrar of vital statistics.

A certified copy of the birth record corrected or registered by court order as provided in this section shall have the same legal effect for all purposes as an original birth record.

The application, affidavits, findings, and orders of the court, together with a transcript of the testimony if ordered by the court, for the correction of a birth record or for the registration of a birth, shall be recorded in a book kept for that purpose and shall be properly indexed. The book shall become a part of the records of the probate court.

(D)(1) Except as provided in division (D)(2) of this section, whenever a correction is ordered in a birth record under division (A) of this section, the court ordering the correction shall forthwith forward to the department of health a certified copy of the order containing such information as will enable the department to prepare a new birth record. Thereupon, the department shall record a new birth record using the correct information supplied by the court and the new birth record shall have



the same overall appearance as the original record which would have been issued under this chapter. Where handwriting is required to effect that appearance, the department shall supply it. Upon the preparation and filing of the new birth record, the original birth record and index references shall cease to be a public record. The original record and all other information pertaining to it shall be placed in an envelope which shall be sealed by the department, and its contents shall not be open to inspection or copy unless so ordered by the probate court of the county that ordered the correction.

The department shall promptly forward a copy of the new birth record to the local registrar of vital statistics of the district in which the birth occurred and the local registrar shall file a copy of the new birth record along with and in the same manner as the other copies of birth records in the local registrar's possession. All copies of the original birth record, as well as any and all other papers, documents, and index references pertaining to it, in the possession of the local registrar shall be destroyed. The probate court shall retain permanently in the file of its proceedings such information as will enable the court to identify both the original birth record and the new birth record.

The new birth record, as well as any certified copies of it when properly authenticated by a duly authorized person, shall be prima-facie evidence in all courts and places of the facts therein stated.

(2) If the correction ordered in the birth record under division (A) of this section involves a change in the date of birth of the applicant and the department of health determines that the corrected date of birth is inconsistent with the date shown as the date the attending physician or certified nurse-midwife signed the birth record or the date the local registrar filed the record, the department shall request that the court reconsider the order and, if appropriate, make a new order in which the dates are consistent. If the court does not make a new order within a reasonable time, instead of issuing a new birth record, the department shall file and record the court's order in the same manner as other birth records and make a cross-reference on the original and on the corrected record.

(E) The probate court shall assess costs of registering a birth or correcting a birth record under this section against the person who makes application for the registration or correction.

ROBERT W. (BOB) BERGER

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

1968 – Graduate of Theodore Roosevelt High School

1972 – Graduate of KSU (BS in Education)

1972-1974 – U.S. Army

1977 - Graduate of University of Baltimore Law School

Am Jur Awards (Family Law And Trial Advocacy)

1978-1980 - Solo Practice

1980-2007 - Giulitto & Dickinson, Giulitto & Berger

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

Judge Laurie Pittman

2015–2021 (Retired) Judge Portage County Probate & Juvenile Courts

Pro Bono Attorney of the Year 1992

President of Portage County Bar Association 2007-2008

Norman Sandvoss Humanitarian Award 2010

COMPETENCY?

HOW DOES ONE MAKE A VALID WILL?

Section 2107.02 Who May Make a Will.

A person who is eighteen years of age or older, of **sound mind and memory**, and not **under restraint** may make a Will.

Section 2107.03 Method of Making a Will.

Except oral Wills, every Will shall be in writing, but may be handwritten or typewritten. The Will shall be signed at the end by the testator or by some other person in the testator's conscious presence and at the testator's express direction. The Will shall be attested and subscribed in the conscious presence of the testator, by two or more competent witnesses, who saw the testator subscribe, or heard the testator acknowledge the testator's signature.

For purposes of this section, "conscious presence" means within the range of any of the testator's senses, excluding the sense of sight or sound that is sensed by telephonic, electronic, or other distant communication.

CAPACITY TO MAKE A WILL

"Capacity" is often used in case law but it is a sloppy and often inaccurate term.

O.R.C. 2107.02 Testator must be "of sound mind and memory, and not under restraint."

Capacity to make a Will is unique to Probate.

There are many uses of the word incompetency or competency in law and rule:

1. **Capacity to Make a Will.** O.R.C. 2107.02 (sound mind and memory and not under restraint.)

2. **Competency to Testify as a Witness.** Evid.R. 601

B(1) incapable of expressing himself or herself;

B(2) incapable of understanding the duty to tell the truth;

3. **Guardianship.** O.R.C. 2111.01(D).

(D) “**Incompetent**” means either of the following:

(1) Any person who is so mentally impaired, as a result of a mental or physical illness or disability, as a result of intellectual disability, **or** as a result of chronic substance abuse, that the person is incapable of taking proper care of the person’s self or property **or** fails to provide for the person’s family or other persons for whom the person is charged by law to provide; ...

- Application for Guardianship must contain Expert Statement
- Investigating and Report O.R.C. 2111.042 and least restrictive accommodation
- Court can Appoint a Physician. O.R.C. 2111.031
- Ward can contest guardianship
 - may ask for an attorney
 - may ask for an independent doctor’s evaluation
- Report of Guardian two (2) years after issuing of guardianship. O.R.C. 2111.49
- Statement of Guardian **and** licensed physician, licensed clinical psychologist or developmental disability team of evaluation or

examining of ward within three (3) months of report **as to need to continue guardianship**. O.R.C. 2111.49(1)(i).

- Ward can seek to terminate the guardianship at any time. O.R.C. 2111.47
- If the ward marries, the guardianship of person terminates. O.R.C. 2111.49
- Probate Court is the Superior Guardian of Wards. O.R.C. 2111.50

4. **Qualify as Incompetent for Employment or Disability Insurance is Contractual.**

5. **Government Disability Benefits as Incompetent by Statute or Administrative Law.**

- a) Veterans Administration
- b) Social Security Disability
- c) Other government agencies

6. **Judge is incompetent or disqualified.**

Ohio Constitution IV.17 (quasi impeachment)
(over 70 years) IV.06(C)
Judicial Conduct Code
Conflict of Interest

7. **Lawyers.**

Code of Professional Responsibility
Duty to represent client with diminished capacity. Rule 1.14

8. **Jurors.**

Able to observe and hear
Render fair and just verdict based upon Court's instructions on law

None of the determinations of competency or disqualification are *per se* as to whether a Will is valid although they may be considered by the trier of fact upon proper foundation.

Will contest - a jury determines whether the Will is valid or not valid. Was Will maker:

1. not of sound mind when he made the Will (testamentary capacity), or
- 2) was under restraint (undue influence), or
- 3) was Will forged, or
- 4) was Will not properly executed, or
- 5) was Will revoked, or
- 6) was person of full age (eighteen [18] years).

MOST COMMON REASONS TO CONTEST VALIDITY OF A WILL TO A JURY

Sound Mind: (competent to make a Will or testamentary capacity)
OJI-CV 633.03

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

2. **ELEMENTS.** However, the law requires:

- (a) That the testator **understand that he is making a Will to dispose of his property at death.**
- (b) That the testator **understand generally the nature and extent of his property.**
- (c) That the testator have **in his mind the names and identity of those persons how are his relatives, next-of-kin,** or the natural objects of his bounty and understand his relationship to them.

3. **MENTAL CAPACITY REQUIREMENTS.** A testator is not required to have sufficient mental capacity to make a contract or to conduct normal business affairs. He must, however, have a **sufficiently active mind and memory to understand the three conditions just given above.** He or she must be able to remember them a sufficient length of time to consider their obvious relations to each other, and to be able to form a rational judgment with reference to them, even

though he may not be able to understand and appreciate these matters as well as a person who has vigorous health, in both mind and body. It is **not** necessary that he be aware of these three conditions and have them in his mind at **all times**, since his health and mental condition may vary from time to time. But he must have them in mind during the time that he signs the Will.

SOUND MIND AND MEMORY. If one **at time of making a Will** understands the nature, extent, and scope of the business he is about to transact, and possesses that degree of mental strength which would enable him to understand the nature and extent of his property, the identity of those who have natural claims on his bounty, and his relation to members of his family, he is, in law, considered a person of sound mind and memory. OJI-CV 633.03

CV 633.05 Under Restraint (Undue Influence)

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

- (a) A testator is a person who is or **can be influenced** by reason of advanced age, physical infirmities, mental condition, fear, or for any other reason would yield to the **desire or will of another person or persons**;
- (b) The **opportunity** for a person or persons to **exert it**;
- (c) The **fact** of improper influence exerted or attempted;
- (d) A Will **showing the effect of such influence**.

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

3. **UNDUE INFLUENCE.** Undue influence sufficient to invalidate a Will is that which **substitutes the plans or desires of another for those of the testator**. The influence must be such as to **control the mind** of the **testator** in the making of his Will, to **overcome his power of resistance**, and to result in his making a

distribution of his property which he would not have made if he were left to act freely and according to his own plans and desires.

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

Did the Will maker have free will and judgment at the time of making the Will?

HOW TO PROVE ALLEGATIONS OR DISPUTE ALLEGATIONS IN A WILL CONTEST

- 1) **Direct Evidence**
(at the time of making the Will)
2. **(Indirect Evidence)** Circumstantial Evidence
near time of making the Will
maybe - eighteen (18) months before or after
3. **Expert Testimony**
based on medical, hospital, or doctors' reports near the time of making the Will. In most jury trials, on validity of a Will, an expert witness is necessary to testify as to testator's capacity to make a Will at the time of the Will's execution.

NEW TRAP FOR THE UNWARY

Civ.R. 26(B)(7) Expert Witness (eff. 7-1-21)

(a) A party **must disclose to the other parties the identity of any witness** it may use at trial to present evidence under **Ohio Rule of Evidence 702, 703, or 705.**

(b) **The reports of expert witnesses** expected to be called by each party **shall be exchanged with all other parties**. The parties shall submit expert reports and curricula vitae in accordance **with the time schedule established by the Court**. The **party with the burden of proof** as to a particular issue shall be required to **first submit expert reports** as to that issue. Thereafter, the responding party shall submit opposing expert reports within the schedule established by the Court.

(c) Other than under subsection (d), **a party may not call an expert witness to testify unless a written report has been procured** from the witness and provided to opposing counsel. **The report of an expert must disclose a complete statement of all opinions and the basis and reasons** for them as to each matter on which the expert will testify. It must also state the compensation for the expert's study or testimony. *Unless good cause is shown, all reports and, if applicable, supplemental reports must be supplied no later than thirty (30) days prior to trial.* An expert will not be permitted to testify or provide opinions on matters **not disclosed** in his or her report.

(d) **Healthcare Providers.** A witness who **has provided** medical, dental, optometric, chiropractic, or mental health care may testify as an expert and offer opinions as to matters addressed in the healthcare provider's records. Healthcare providers' records relevant to the case shall be provided to opposing counsel in lieu of an expert report in accordance with the time schedule established by the Court.

(e) A party **may take a discovery deposition** of their opponent's expert witness **only after the mutual exchange of reports** has occurred unless the expert is a healthcare provider permitted to testify as an expert under subsection (d). Upon good cause shown, additional time after submission of both sides' expert reports will be provided for these discovery depositions if requested by a party. If a party chooses not to hire an expert in opposition to an issue, the party will be permitted to take the discovery deposition of the proponents' expert.

- Sometimes attorneys avoid hiring experts or expert depositions to avoid costs.
- Sometimes attorneys delay depositions as a trial technique to keep their opponent off-balanced.
- **Civ.R. 26(A)(7)(c) can be a trap.**

WHAT CAN YOU DO TO AVOID A WILL CONTEST OF A FRAGILE TESTATOR?

1) file a testator's complaint to determine the Will's validity before testator's death. O.R.C. 5817.02

- Hearing (adversarial). O.R.C. 5817.08
- Burden of Proof Testator. O.R.C. 5817.09
- Declaration of Validity. O.R.C. 5817.10
- Effect of Declaration. O.R.C. 5817.11
- Subsequent Modification. O.R.C. 5817.12
- Admissibility of Evidence. O.R.C. 5817.14

2) drawbacks are the expense, length of time for ruling, and service of all parties affected.

3) At Time of Execution of Will

- videotape execution
- examination by an expert
- ask detailed questions designed to refute arguments concerning soundness of mind and memory, restraint or fraud
- have witnesses observe the questioning of the testator before he signs Will (not family or persons with interest in Will)

**CASE LAW UPDATE
2021**

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 2021

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

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

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

Personal: Married to Lou Ann Malone Fredericka, 42 years; Children - Gina Marie (Graduate, St. Mary's College 2013, Graduate, Kent State University, B.S.N. 2016, Nurse); Michael James (Graduate, University of Notre Dame 2015, University of Akron, School of Law, J.D. 2018, Attorney at Law).

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

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

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

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

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

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

FILED
PROBATE COURT
JUVENILE COURT
AUG 02 2021
CRAWFORD COUNTY OHIO

In the matter of Marisa Burdette McBride application

Case No. 034366

JUDGMENT

This matter came on for hearing July 21, 2021, present in the courtroom was Marisa Burdette McBride. The case was called and the applicant was sworn in who then testified.

The court finds that the birth certificate previously treated by the Department of Health, office of vital statistics, file number 197-462-8537 with the name of Marisa Burdette McBride indicates the gender marker of the applicant to be a male. Although the applicant did not present the original birth certificate nor a copy of same the applicant nevertheless testified that it also indicated a male gender demarcation.

The applicant also testified that the applicant was a transgender and is currently 47 years of age, the applicant changed applicant's name from Matthew Burdette McBride to Marisa Burdette McBride on April 7, 2020 via a name change application that was processed in the Marion County Probate Court case number 20 NGC 002. Upon inquiry by the court the applicant testified that when applicant turned 45 years of age applicant decided to change applicant's gender identify to female thus the reason for changing applicant's name. Applicant then testified that applicant now wishes to change the gender marker on applicant's birth certificate and cited the case of Ray v. McCloud , Dir. Ohio Department of Health in the United States District Court Southern District of Ohio eastern division case number 2:18-CV-272 as authority for this Court to allow said change. Applicant was advised that the McCloud case involved an administrative agency and its "policy" towards judgments changing gender markers in birth certificates. The applicant was further advised that this Court must follow the mandates set forth in section 3705.15 ORC which only empowers this court to correct errors in birth certificates. Regardless of this dialogue applicant presented no evidence that the birth certificate originally issued nor the 2nd birth certificate issued after the foregoing name change was incorrect. In fact applicant presented no evidence as required by said

section as to applicant's gender then or now. Applicant only presented that the applicant desired to have the gender marker changed to reflect that which the applicant now identifies.

Section 3705.15 ORC grants this court the authority only to "correct" errors not to make "changes" based on current desire. This Court can only consider the evidence as applied to the foregoing statute, the court cannot make new law or interject personal thoughts as to what the statute should say and the court must follow the rule of law that statutes are presumptively constitutional. The McCloud decision does not address the constitutionality of the statute. Furthermore should have McCloud declared 3705.15 ORC to be unconstitutional then there would be no statute for this court to refer to make a decision herein.

Upon reviewing the McCloud case this court respectfully disagrees with the opinion issued by Judge Watson in any event. Judge Watson concludes that transgender people are entitled to heightened protection under the equal protection clause as a quasi-suspect class and thus finds that there must be a substantial important governmental objective in order for the "policy" of an administrative "agency" to survive constitutional scrutiny. Judge Watson also goes on and opines that the State of Ohio does not have a substantial government interest or objective in having accurate gender identifying records however Judge Watson also states that he does not disagree that accurate records are important, this appears to be somewhat inconsistent. Upon reflection, this Court can easily identify several legitimate and substantial objectives as to why the State of Ohio and the US government have substantial governmental interest in having accurate records of vital statistics when it comes to gender demarcations, that Judge Watson simply overlooked. A few examples would include the following: life-mortality tables found in the ORC and the Ohio Admin. Code as well as within the national vital statistics reports which clearly delineates life expectancies that are different between genders. These statistics do impact on a variety of governmental and private business interests i.e. commercial commerce interests that is obviously regulated by the government such as the insurance industry; gender demarcations would in fact affect retirement accounts, life insurance policies, annuities, social security, Medicare, Medicaid programs etc.; genders statistics do also have an actuarial impact on insurance premiums, projections and statistical management of state as well as federal programs; liability insurance policies would be affected as well as liability policies and the premium charged for same differ when it comes to men versus women particularly in younger ages when driving cars etc.

The Insurance industry is regulated by the Department of Insurance which also relies upon accurate gender demarcation; creditor fraud; identity fraud and theft; applications for government grants and loans based on gender; medical treatment which differs substantially when treating women v. Man, this could have an adverse impact for this applicant as well as all patients furthermore medical providers would like to know their treating people correctly and avoid liability; Medicare and Medicaid also need accurate gender records and authorizing different procedures and general care based on gender; medical records and statistics for medical studies and surveys used by the medical care facilities, medical schools and medical journals all need accurate statistics so medical providers can properly treat patients and new treatments can be developed that work; gender classes in state and federal sexual harassment cases would also be impacted; applications for college admissions as well as scholarships and grants which are most assuredly gender driven, which substantially impact state operated schools; sports at the college level also would need accurate gender demarcation unless one assumes that colleges will eventually remove all demarcation and simply have one team for both genders in every sporting event; it should also be noted that the Supreme Court of Ohio requires attorney to register on a periodic basis, requiring accurate gender and race demarcations which is mandatory for the Supreme Court to consider; sexual predator reporting registrants could also be affected negatively if one can change names and gender in the attempt to avoid reporting altogether; State and federal law enforcement agencies also need to have accurate identifying records as well and lastly federal and state penal institutions will also need to have accurate gender demarcations due to a variety of state and federal laws that require genders to be housed separately. These are just a few examples why accurate gender demarcations are needed and why there are substantial governmental objectives and interest to maintain same.

It is not lost on the undersigned that there are some who promote the concept that one should be allowed to choose what gender one identifies with from a psychological standpoint and that one should be allowed to change one's name to reflect the gender which they identified however this overlooks a legitimate government interest in having accurate vital statistics from a biological standpoint. The fact is there is a biological component to this issue that has real implications on many of the government programs and commerce decisions made by business and industry that permeates our society. Simply put biological differences and accurate gender

demarcations are critical for these continued government programs and business commerce decisions based on these differences. The court makes mention of this because 3705.15 ORC clearly considers biological differences when it comes to gender demarcation as it requires a physician's testimony or affidavit ostensibly to address the biological differences. In this case the court finds that there is a total lack of evidence on the issue of whether or not there was a mistake that needs corrected, query how can one correct a document that's not incorrect?

Also if one can change a gender demarcation simply due to a desire to identify with a different gender and later in life that person decides to change it back because of a new desire, does this create problems for the State of Ohio? Doesn't the State have expense and logistical delay problems in keeping accurate records, doesn't the State of Ohio have a legitimate and substantial interest in keeping consistent records consistently?

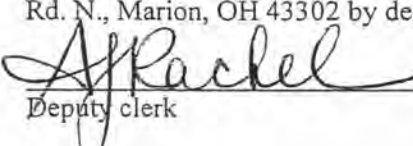
In addition if we open the door and allow gender markers to be changed based on desire, why can't a person desire to change one's eye color or even date of birth to collect social security earlier than normal. Why couldn't someone change their race based on desire then utilized that race marker to apply for federal loans and grants that might be available to one race as opposed to another? Once we allow the changing of vital records based on desire are we not opening Pandora's box, are we not making vital statistics absolutely useless and isn't there a substantial government interest in preventing this?

Regardless of the McCloud decision this court finds that this Court must comply with the statute as written and cannot be concerned with a decision that declares a "policy" of a "governmental agency" to be unconstitutional. Section 3705.15 ORC does not allow the court to "change" a gender marker it only allows and authorizes the court to "correct" incorrect entries in the certificate. In this case no evidence exists that the original certificates were incorrect, no evidence exists as to what the gender of the applicate is or was, therefore, for these reasons the applicant's request is denied. It is so ordered: this is a final and appealable order;


Judge Patrick T Murphy

Certificate of service

The undersigned Deputy clerk of the Crawford County Probate Court do hereby certify that I caused a true and exact copy of the foregoing judgment entry to be served upon Marisa Burdette McBride, 2144 Columbus Dusty Rd. N., Marion, OH 43302 by depositing a copy of it in the regular US mail, this August 2, 2021


Deputy clerk

Case Law Update

Hon. Elinore M. Stormer
Summit County Probate Court



GOOD AFTERNOON

CASE LAW UPDATE

JUNE 2019- SEPT. 2020
(PLUS 2 CASES)

JUDGE ELINORE MARSH STORMER

The end to weirdness:

In re Estate of Shaffer

Ohio Supreme Court

A will on a scrap of paper witnessed by a beneficiary was recognized by the Appeals court as a non conforming will obviating void bequest to witness.

REVERSED

The rules voiding bequest to a witness apply to non conforming wills as well as every other will

Four Ohio Supreme Court
ADOPTION CASES

Indigent bio parents entitled to appointed counsel in adoption proceedings In re adoption of YFF

- Basis for change is the right to counsel in juvenile matters which are not criminal but involve removal of child. Fundamental rights of parent to be protected
- Opinion anticipates public defenders
- Notice to parents ??

Jurisdiction over surrender of child

State ex re C.V. v. Adoption Link

- Probate Courts alone have jurisdiction to approve and consider validity of 5103.15(B)(2)surrender
- If you wear a juvenile judge hat, be careful about how you get the evidence

(Can't take judicial notice of info received in a non probate capacity)

SUPPORT ORDERS

In re Adoption of B.I.

2019 decision: B.I. held that if a parent has a zero support order he or she has the right to refuse consent to an adoption even if he had money and didn't pay. Issue not \$\$, but parental rights

In re Adoption of A.C.B

2020 decision: A.C.B. says that if a parent has a support order, less than full payment of the support, means that consent is **not** required.

Court of Appeals decisions Consent NOT required Maintenance and Support

- In the absence of a child support order, a parent has an independent obligation to support the child even if no request made. A.L.R. 11th Dist.
- Ditto and court does not consider a juvenile court filing for visitation when no support. J.J.P. 8th Dist.
- Focus on contact but with an order and no support: No consent F.L.S. 4th Dist.
- Court found contact thwarted but only partial support paid, no consent if partial payments not justified L.R.O. 2nd Dist.

A TIME FOR OBJECTIONS

- R.C. 3107. 06 requires notice of an objection to be filed within 14 days.
- Courts consistently find that failure to timely object waives the right to withhold consent
- All Cases decided in the materials decided before the Supreme Court ordered that indigents be given counsel
- Will Court find the time limits interfere??
- But see, P.H.K., 4th Dist Objection filed late but issues raised in best interest hearing

Consent not required: CONTACT

Cases of interest:

To establish justifiable cause, *inter alia*, Father should have searched for Mom using all available sources C.D.G. 2nd Dist.

Contempt motion re visitation in Juvenile Court is not contact with child L.S. 3rd Dist

Voluntary no contact order is not justifiable cause requiring consent. Distinction between voluntary and involuntary T.C.U. 6th Dist

A SPLIT ON NO CONTACT ORDERS FILED IN CRIMINAL CASE ??

- No contact order as part of child endangering conviction with bio child as victim is not justifiable cause. CHB 3rd Dist.
- BUT, in analogy to zero support order, Dad who murdered Mom found to have justifiably relied on no contact order and consent required. A.K. 8th Dist

JUSTIFIABLE CAUSE CAN TAKE MANY FORMS

Fact dependent:

Prison sentence and rehab, L.G., 5th Dist.

Consistent cards and letters, S.L.P., 8th Dist;
C.A.H., 5th Dist;

Interference by silence or otherwise, A.L.H., 9th Dist.; J.R.J., 2nd Dist.; N.R.H.N. 12th Dist; B.T.R., 5th Dist.

PROCEDURE: JUDICIAL NOTICE



- Grandma had legal custody through Juvenile Court for over two years of grandchild.
- Mom files for interference with visitation which is overruled
- Grandma the files for adoption and Court rules that mom's consent is required referring to visitation hearing testimony
- You are one person with two hats and you cannot mix and match

JURISDICTION – 2 INTERESTING CASES

- You can pick your hat if you are P2 when:
- Juvenile court had given custody to grandpa who filed for adoption after 5 years.
- Bio parents filed for visitation after adoption filed
- Juvenile Court can stay visitation until Probate decides adoption B.N.S., 12th Dist.
- Can't stop adoption if you have never been declared a parent even if you are. L.M.S. 5th Dist.

PROCEDURE: Best Interest hearing must let bio parent testify

- Court held objection hearing and found bio Dad had only minimal contact with child without cause – Consent not required
- Court immediately began best interest hearing and removed dad from court
- Reversed – have to let bio dad participate in best interest hearing
- T.C.W., 4th Dist

It's True: Women are better at Estate Planning than Men

Dave was a single guy, living at home with his father and working in the family business. He knew that he would inherit a fortune once his sickly father died.

Dave wanted two things:

- to learn how to invest his inheritance and,
- to find a wife to share his fortune.

One evening at an investment meeting, he spotted the most beautiful woman he had ever seen. Her natural beauty took his breath away .

"I may look like just an ordinary man," he said to her, "but in just a few years, my father will die, and I'll inherit 20 million dollars. Impressed, the woman obtained his business card.



Two weeks later, she became his stepmother.

ESTATES

Spousal Waiver must be knowingly waived

Helen's husband died, she opened no estate and cashed his dividend checks for 7 years before she died in 2017.

Then, Husband's son opened estate for Dad and Helen's executor asked for spousal allowance. Son objected as she had cashed checks. C/A says waiver must be knowing and her no indication that she was informed.

Estate of Kuzman, 2019 Ohio 4135

STANDING

Friend of decedent sought to challenge will properly admitted to Probate, claiming an interest in a prior will. Earlier will did leave residence to friend.

Summary judgment granted to Executor because friend lacked standing. As he was not named in current or interim wills, and was not a relative under intestate law, he was not longer a "person interested" in the will. Must have pecuniary interest in estate.

Cook v. Everhart, 2019 Ohio 3044



- 6 Months is 6 months unless it is a mechanic's lien. The lien follows the property *in rem*. But remand to determine validity of lien.

US Bank v. Swartz, 2019 Ohio 2021

- Creditor claims to distributees who may share liability for payment of claim not bound by 6 months when estate is released from administration? 2117.06(A)(2).

In re Lacey, 2019 Ohio 3384

ESTATES – ATTORNEY FEES





THE WIENER FAMILY (or should I say, WHINER FAMILY)



2020 Ohio 1527; 2019 Ohio 2354

- Mom dies in 1998 and the estate is still going on in Montgomery County with 3 children still fighting.
- 2 cases in our time period covering attorney fees. Probate Court must consider each bill and Wrongful death suit, later abandoned, and defense of executor suit fees proper.
- On remand, and appeal, Court award upheld where court looked at each bill but did not hold a 2nd hearing.



In re: ESTATE OF BOLOG

2019 OHIO 4083

- Frank, son of decedent opened estate per will later found to be invalid because of his undue influence and Dad's dementia
- Concealment action vs Frank because he had taken advantage of parents getting them to transfer companies and loan money to him. Jury found he had concealed debts to Dad. Frank claimed no jurisdiction because debt collection. NO – return of assets in the form of debt within Probate jurisdiction



THE NEIGHBOR, IN THE BANK, WITH THE POWER OF ATTORNEY

TRANSFERS ON DEATH

Estate of Gravis v. Coffee, 2019 OHIO 2806

- Process to appoint a guardian for Gravis began in June and guardian of person appointed
- Guardian of estate not appointed until November 25.
- Gravis died and neighbors presented a TOD for his house which had been signed by Gravis on November 23. Court declared TOD invalid as signed when Gravis was compromised.
- Affirmed. TOD filed after guardianship is

VOID

FRIVOLOUS CONDUCT

In re Estate of O'Toole, 2019 Ohio 4165

- Mom dies leaving 5 adult children. 2 accused the other 3 of hiding assets. Fiduciary found cash and gave each child $\frac{1}{5}^{\text{th}}$
- Thomas denies getting his share despite 2 witnesses. He then makes numerous unsubstantiated claims, files 12 subpoenas to get privileged information, and objects to everything.
- After hearing, court finds Frivolous Conduct, charged him the difference in attorney fees for a normal estate vs this type of an estate. **Affirmed**

GUARDIANSHIPS- Appointment

- Dad was well until he wasn't. 2 daughters had POA for health and finances but after a devastating illness, 3rd daughter became primarily involved.

Family disputes regarding dad began
and dad's dementia increased.
13 children, many of whom took some
advantage.

- Eventually 5 kids plus 1 filed for guardianship. Court did not pick the one whom he nominated. Did add "bespoke" conditions. Aff'd

In re Keane, 2020 Ohio 1105

Life Insurance - R.C. 5815.33

- Parties' divorce decree did not include life insurance policy on Wife benefiting husband. Here, for years after split, premiums sent to wife were paid by ex.
- Statute says if policy not in decree automatically revokes spouse as beneficiary.
- Do proceeds go to ex or contingent beneficiary?

Durbin v. Life Ins. Co., 2018 CV 00059
(Summit Probate)

To the Ex

- We hold that where there is uncontested evidence of the insured's clearly expressed intent to retain a former spouse as the beneficiary on an insurance policy after the divorce...R.C. 5815.33(B)(1) does not operate to preclude the former spouse from being entitled to the insurance proceeds as a matter of law. We note that our decision is consistent with the Supreme Court of Ohio's acknowledgment of "the policy behind the enactment of (now R.C. 5815.33(B)(1)) might have been to remedy the mistake of a spouse who inadvertently fails to remove the ex-spouse as a beneficiary to a life insurance policy" given that there is no evidence in this case that (the decedent) made this mistake. *In re Estate of Holycross, supra. Sherborne supra at 1139*

NAME CHANGES



In re: K.C.M., 2019 Ohio 5182

In re: S.D.L., 2019 Ohio 2950

- Two cases involving absent bio dads In both cases, bio dad's paid support.
- In K.C.M. father objected to name change to step dad unless he would adopt child obviating child support. Change granted
- In S.D.L., father in prison also wrote letters but had no relationship. He asked court to change the child's last name to his as a "symbolic connection." Change denied

PROBATE PROCEDURE

Attorneys as witnesses

- 3 Cases on disqualifying attorneys who may be called as witnesses. Prof. Cond. R. 3.7(a)
- Lawyer who is a “Necessary Witness” whose testimony is uncontroverted, concerns fees or if disqualified = a substantial hardship can testify
- Failure to use 2 part test is abuse of discretion.
- Testimony must be material, relevant and otherwise unobtainable. And atty testimony not theoretical, confusing or prejudicial.

CASES

- Tuttle, 2019 Ohio 5363, Decedent’s atty son-in-law improperly banned from testifying where issue was venue and court did not do 2 part analysis
- Krugliak etc.v. Lavin, 2020 Ohio 3123, Out of State atty not admitted *pro hac vice* when atty was a necessary witness in fee dispute even if work might be limited
- Krueger v. Willowood, 2019 Ohio 3976, Limit on attorney witnesses to sit at trial table only rev’d for 2 part analysis

PROCEDURE: SERVICE BY PUBLICATION

- Service by publication permitted on affidavit indicating that Plaintiff twice attempted service at address on police report. Then tried to get an address from Def's insurance Co.
- Def sought to overturn default for lack of service. Def argued that Pl should have tried the internet, google and BMV to show reasonable diligence. Aff'd Internet search was **not** necessary.
- Corrao v. Bennett, 2020 Ohio 2822
- "COVID" Service"



TRUSTS: REMOVAL OF TRUSTEE Doran v. Doran, 2020 Ohio 1583

- Parents trusts with provision that after 2nd parent died, and taxes paid, the trust was to be placed into individual sub-trusts within 5 years. The years passed....
- Instead all assets placed into family trust and contention between parties
- Court immediately removed trustees in a court hearing when they couldn't tell him how much was in trust. Aff'd

Just a strange wills case In re L.M.W., 2019 Ohio 3873

- ? Of validity of later will. Proponent of will has initial burden which shifts to one challenging the will. Court stated wrong statute placing burden on challenger. Remanded and fixed
- The twist: Will had *in terrorem* provision and first will named appellant as executor
- 9th dist found order denying App's exec status affected a substantial right and no contest provision provided no other remedy, so appeal at this juncture ok'd

STRUCTURED SETTLEMENTS

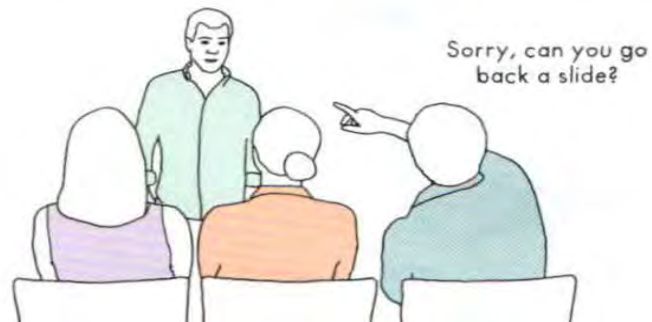
- R.C. 2323.584(B)(1) requires the Court to hold a timely hearing on an application to sell a structured settlement.
- Where Court summarily denied the application without a hearing, the decision is reversed.

In re O'Dell, 2019 Ohio 3987

TRICKS TO APPEAR SMART IN MEETINGS

Ask the presenter to go back a slide

This will immediately make you look like you're paying closer attention than everyone else. Then, after staring at the slide silently for several seconds, say "Ok, we can move on."



Ohio Supreme Court Adoptions

TOPIC:	Indigent bio parents are entitled to counsel in adoption proceeding	1
TITLE:	<u>In re Adoption of YFF</u> , 2020-Ohio- 6785	
COURT:	Supreme Court of Ohio	
TOPIC:	R.C. 5103.15 (B) (2) surrenders are outside the scope of a juvenile court authority to approve, the probate court has the authority to determine the validity of (B) (2) surrenders.	2
TITLE:	<u>State ex re. C.V. v. Adoption Link, Inc.</u> , 2019-Ohio-2118	
COURT:	Supreme Court of Ohio	
TOPIC:	Parent's nonsupport of minor child pursuant to a zero-support order provides "justifiable cause" and does not negate the requirement of parental consent to adoption.	2
TITLE:	<u>In re Adoption of B.I.</u> , 2019-Ohio-2450	
COURT:	Supreme Court of Ohio	
TOPIC:	The plain language of R.C. 3107.07 (A) requires a parent pay support as ordered in a judicial decree. Partial payment not enough	3
TITLE:	<u>In re Adoption of A.C.B.</u> , 2020-Ohio-629	
COURT:	Supreme Court of Ohio	

Ohio Supreme Court Wills

TOPIC:	Bequest to witness of will is void	1
TITLE:	In re the Estate of Shaffer, 2020 –Ohio- 6672	
COURT:	Supreme Court of Ohio	

Courts of Appeal

ADOPTIONS

MAINTENANCE AND SUPPORT- Consent not required

TOPIC:	Neither absence of a child support order or custodial parent's failure to request support constitute justifiable cause.	3
COURT:	Supreme Court of Ohio	
TITLE:	<u>Matter of Adoption of A.L.R.</u> , 2019-Ohio-4320	
COURT:	Court of Appeals of Ohio, Eleventh District	
COUNTY:	Geauga	
TOPIC:	Duty to provide support is valid regardless of a lack of a court order for support.	4
TITLE:	<u>In Re Adoption of J.J.P.</u> , 2020-Ohio-679	
COURT:	Court of Appeals of Ohio, Eighth District	
COUNTY:	Cuyahoga	

TOPIC: Consent is not required when failure to provide maintenance and support 4
TITLE: In the Matter of Adoption of F.L.S., 2020-Ohio-936
COURT: Court of Appeals of Ohio, Fourth District
COUNTY: Hocking

TOPIC: Consent is not required when failure to provide maintenance and support 4
TITLE: In re Adoption of O.B.J., 2020-Ohio-4148
COURT: Court of Appeals of Ohio, Twelfth District
COUNTY: Warren

TOPIC: No consent required if parent pays only a portion required by judicial decree 5
TITLE: In Re L.R.O., 2020-Ohio-3200
COURT: Court of Appeals of Ohio, Second District
COUNTY: Darke

CONSENT NOT REQUIRED- CONTACT

TOPIC: No Justifiable lack of contact where Father did not use all available sources 6
TITLE: In Re C.D.G., 2020-Ohio-2959
COURT: Court of Appeals of Ohio, Second District
COUNTY: Montgomery

TOPIC: Two letters and a Christmas card sent after petitions for adoption were filed 6
sufficient for a finding of de minimis contact only
TITLE: Matter of K.M.F., 2019-Ohio-2451
COURT: Court of Appeals of Ohio, Fourth District
COUNTY: Highland

TOPIC: Father's consent is not required if one phone call in 3 years 7
TITLE: In re Adoption of L.B.R., 2019-Ohio-3001
COURT: Court of Appeals of Ohio, Second District
COUNTY: Clark

TOPIC: Mother's consent is not required when no attempt to contact for 5 years 7
TITLE: In re S.A.N., 2019-Ohio-3055
COURT: Court of Appeals of Ohio, Twelfth District
COUNTY: Warren

TOPIC: No justifiable cause for the father's failure to have contact with son. 7
TITLE: Matter of Adoption of N.I.B., 2019-Ohio-4412
COURT: Court of Appeals of Ohio, Eleventh District
COUNTY: Ashtabula

TOPIC: Contempt motion with the juvenile court does not count as contact with the child. 8
TITLE: In Re: the Adoption of: L.S. [Cody Schoonover..., 2020-Ohio-224
COURT: Court of Appeals of Ohio, Third District
COUNTY: Hancock

TOPIC:	No contact order entered voluntarily does not provide justification for less than de Minimis contact	8
TITLE:	<u>In Re Adoption of T.U.</u> , 2020-Ohio-841	
COURT:	Court of Appeals of Ohio, Sixth District	
COUNTY:	Williams	
TOPIC:	No contact order resulting from conviction for endangering child is not justifiable cause.	9
TITLE:	<u>In Re the Adoption of C.H.B.</u> , 2020-Ohio-979	
COURT:	Court of Appeals of Ohio, Third District	
COUNTY:	Crawford	
CONSENT REQUIRED - CONTACT		
TOPIC:	Lack of contact justifiable when reliance on a court order of no contact.	9
TITLE:	<u>In re Adoption of A.K.</u> , 2020-Ohio-3279	
COURT:	Court of Appeals of Ohio, Eighth District	
COUNTY:	Cuyahoga	
TOPIC:	Consent required when mom trying to get it together	9
TITLE:	<u>Matter of Adoption of L.G.</u> , 2019-Ohio-4410	
COURT:	Court of Appeals of Ohio, Fifth District	
COUNTY:	Guernsey	
TOPIC:	Silence to attempts to make contact is interference and discouragement that demonstrate justifiable cause.	10
TITLE:	<u>In re A.L.H.</u> , 2020-Ohio-3527	
COURT:	Court of Appeals of Ohio, Ninth District	
COUNTY:	Medina	
TOPIC:	Significant interference with visitation by a custodial parent qualifies as Justifiable cause for non-custodial parent's failure of contact.	10
TITLE:	<u>Matter of Adoption of J.R.J.</u> , 2019-Ohio-4701	
COURT:	Court of Appeals of Ohio, Second District	
COUNTY:	Darke	
TOPIC:	Gifts and mail from prison enough for de minimis contact	10
TITLE:	<u>In Re Adoption of C.A.H.</u> , 2020-Ohio-1260	
COURT:	Court of Appeals of Ohio, Fifth District	
COUNTY:	Knox	
TOPIC:	Consent is required for adoption by maintaining contact through phone calls, gifts, and cards.	11
TITLE:	<u>In Re Adoption of S.L.P.</u> , 2020-Ohio-495	
COURT:	Court of Appeals of Ohio, Eighth District	
COUNTY:	Cuyahoga	
TOPIC:	Justifiable cause existed for lack of contact where mom tied visits to \$\$	11
TITLE:	<u>In re N.R.H.N.</u> , 2020-Ohio-4266	
COURT:	Court of Appeals of Ohio, Twelfth District	
COUNTY:	Clermont	

TOPIC: Parent that is prevented from seeing child and who is up to date on child support provided more than de minimis contact. 12
TITLE: In re Adoption of B.T.R., 2020-Ohio-2685
COURT: Court of Appeals of Ohio, Fifth District
COUNTY: Morrow

BEST INTEREST

TOPIC: Adoption not in the best interest of the child where the adoption assessor recommended the adoption but failed to investigate father or his family, and mother had refused visits with father or his family despite court ordered visitation. 12
TITLE: In re Adoption of L.G., 2019-Ohio-2422
COURT: Court of Appeals of Ohio, Sixth District
COUNTY: Sandusky

TOPIC: Adoption by step dad denied when evidence showed it was in the best interest of the child to continue biological father's involvement in his life. 13
TITLE: Matter of Adoption of P.K.H., 2019-Ohio-2680
COURT: Court of Appeals of Ohio, Fourth District
COUNTY: Scioto

TOPIC: Adoption not in the best interest of the child upheld where the court found benefit to restoring relationship with bio dad 13
TITLE: Matter of Adoption of K.M.T., 2019-Ohio-4988
COURT: Court of Appeals of Ohio, Fifth District
COUNTY: Licking

TIME FOR OBJECTION

TOPIC: Statute requiring objection within 14 days of notice of adoption petition does not violate Due Process Clause of the 14th Amendment. 5
TITLE: In re Adoption of N.F., 2019-Ohio-5380, and In re Adoption of A.B., 2019-Ohio-5383
COURT: Court of Appeals of Ohio, Third District
COUNTY: Logan

TOPIC: Consent not necessary if party fails to object within 14 days of being served. 5
TITLE: In re Adoption of M.A.S., 2020-Ohio-3603
COURT: Court of Appeals of Ohio, Twelfth District
COUNTY: Clinton

TOPIC: Consent not necessary if required party fails to object within 14 days of being served. 6
TITLE: In re A.M.G.H., 2020-Ohio-534
COURT: Court of Appeals of Ohio, Twelfth District
COUNTY: Clermont

ADOPTION PROCEDURE

TOPIC:	A trial court may not take judicial notice of proceedings from other cases even when it involves the same parties and the same judge.	13
TITLE:	<u>Matter of Adoption of P.R.K.</u> , 2019-Ohio-5389	
COURT:	Court of Appeals of Ohio, Fifth District	
COUNTY:	Ashland	
TOPIC:	Grandparents are not subject to a pre-adoptive approval process.	14
TITLE:	<u>Matter of Adoption of G.M.B.</u> , 2019-Ohio-3884	
COURT:	Court of Appeals of Ohio, Fourth District	
COUNTY:	Pickaway	
TOPIC:	A consenting parent must understand the effect of consent in an adoption hearing. Burden on Court to ensure	14
TITLE:	<u>In Re Adoption of R.Y.</u> , 2020-Ohio-837	
COURT:	Court of Appeals of Ohio, Sixth District	
COUNTY:	Erie	
TOPIC:	Removal of bio parent from the court room after consent hearing deprived him Of his opportunity to be heard on the matter of the child's best interest	15
TITLE:	<u>In The Matter of the Adoption of T.C.W.</u> , 2020-Ohio-1484	
COURT:	Court of Appeals of Ohio, Fourth District	
COUNTY:	Meigs	
TOPIC:	Service of a copy of the adoption petition not required, service of notice of a hearing is sufficient	15
TITLE:	<u>State ex rel. Byard v. Park</u> , 2020-Ohio-3062	
COURT:	Court of Appeals of Ohio, Fifth District	
COUNTY:	Stark	

JURISDICTION

TOPIC:	Juvenile Court has discretion to defer Parents' visitation motion entirely, until the resolution of the Adoption Case in Probate Court.	16
TITLE:	<u>B.N.S.</u> , 2020-Ohio-4413	
COURT:	Court of Appeals of Ohio, Twelfth District	
COUNTY:	Butler	
TOPIC:	No consent for adoption required if Father never established paternity before petition for adoption is filed.	16
TITLE:	<u>In Re L.M.S.</u> , 2020-Ohio-2812	
COURT:	Court of Appeals of Ohio, Fifth District	
COUNTY:	Delaware	

ATTORNEY FEES

TOPIC:	Attorney's fees incurred from refile application to distribute assets cannot be categorically denied.	23
TITLE:	<u>Matter of Estate of Weiner</u> , 2019-Ohio-2354	
COURT:	Court of Appeals of Ohio, Second District	
COUNTY:	Montgomery	
TOPIC:	No abuse of discretion to grant higher fees in a probate case where it is merited due to poor relationship between the beneficiaries.	24
TITLE:	<u>Matter of Estate of Schwenker</u> , 2019-Ohio-2581	
COURT:	Court of Appeals of Ohio, Tenth District	
COUNTY:	Franklin	
TOPIC:	Extraordinary attorney fees may be denied when the estate is small and the services benefitting the estate are appropriately considered.	24
TITLE:	<u>Estate of Brunger</u> , 2019-Ohio-3548	
COURT:	Court of Appeals of Ohio, Eleventh District	
COUNTY:	Portage	
TOPIC:	Sufficient to evaluate each service individually and determine if it was reasonable. No requirement for a second hearing on attorney fees.	25
TITLE:	<u>In Re Estate of Weiner</u> , 2020-Ohio-1527	
COURT:	Court of Appeals of Ohio, Second District	
COUNTY:	Montgomery	
TOPIC:	A finding for attorney's fees cannot be arbitrary, it must be consistent with the evidence in the record.	35
TITLE:	<u>In re Guardianship of Beaty</u> , 2019-Ohio-2116	
COURT:	Court of Appeals of Ohio, Eighth District	
COUNTY:	Cuyahoga	
TOPIC:	One third contingency fee is standard in settlement case and not against manifest weight of evidence.	25
TITLE:	<u>Estate of Green v. Alter</u> , 2019-Ohio-2862	
COURT:	Court of Appeals of Ohio, Fifth District	
COUNTY:	Licking	

CLAIMS AGAINST AN ESTATES

TOPIC:	Limitations period for enforcement of creditor claims against an estate does not apply to mechanic's lien.	21
TITLE:	<u>U.S. Bank National Association v. Swartz</u> , 2019-Ohio-2021	
COURT:	Court of Appeals of Ohio, Tenth District	
COUNTY:	Franklin	
TOPIC:	Applicability of R.C. 2117.06 (A)(2) when a creditor claims to have sent notice to a distributee.	21
TITLE:	<u>In re Lacey</u> , 2019-Ohio-3384	
COURT:	Court of Appeals of Ohio, Tenth District	
COUNTY:	Franklin	

TOPIC: A claim satisfies the presentment requirement of R.C. 2117.06 when it is presented 22
to the executor's attorney.
TITLE: Hatfield v. Heggie, 2020-Ohio-1156
COURT: Court of Appeals of Ohio, Sixth District
COUNTY: Ottawa

TOPIC: Defendant who dies during litigation and the representative of his estate are not
"different" parties for purposes of the savings statute.
TITLE: Warner v. Marshall, 2020-Ohio-1185
COURT: Court of Appeals of Ohio, Twelfth District
COUNTY: Fayette

TOPIC: Interest in a refund paid after Medicaid recipient's death is part of the non-probate 22
estate and can be recovered by the Ohio Department of Medicaid
TITLE: Ohio Dept. of Medicaid v. French, 2020-Ohio-2744
COURT: Court of Appeals of Ohio, Second District
COUNTY: Darke

ESTATES

TOPIC: R.C. 2106.22 provides a surviving spouse an opportunity to set aside a separation 17
agreement with a four month statute of limitations.
TITLE: Matter of Estate of Lodwick, 2019-Ohio-4559
COURT: Court of Appeals of Ohio, Fourth District
COUNTY: Lawrence

TOPIC: The law favors immediate vesting of interests in a will unless clearly indicating an 17
intention to vest at a later date.
TITLE: Estate of Gaskill, 2019-Ohio-4936
COURT: Court of Appeals of Ohio, Third District
COUNTY: Allen

TOPIC: A party challenging an inventory of an estate has the burden of proof to support their 18
challenges.
TITLE: Matter of Wright, 2019-Ohio-3480
COURT: Court of Appeals of Ohio, Fourth District
COUNTY: Gallia

TOPIC: A summary judgment deciding some assets in dispute are probate assets but not 18
making a determination of all assets at issue is not a final appealable order.
TITLE: Newman v. Jones, 2020-Ohio-374
COURT: Court of Appeals of Ohio, Fourth District
COUNTY: Ross

TOPIC: Spouse must have knowledge of a right to allowance before it can be waived, and the 19
waiver must clearly appear.
TITLE: Estate of Kuzman, 2019-Ohio-4135
COURT: Court of Appeals of Ohio, Eleventh District
COUNTY: Trumbull

TOPIC:	If not an “interested person” under R.C. 2107.71 (A), a party lacks standing to challenge a will even if in prior will	19
TITLE:	<u>Cook v. Everhart</u> , 2019-Ohio-3044	
COURT:	Court of Appeals of Ohio, Eighth District	
COUNTY:	Cuyahoga County	
TOPIC:	“Mansion Home” does not require surviving spouse to reside in the home.	20
TITLE:	<u>Chambers v. Bockman</u> , 2019-Ohio-3538	
COURT:	Court of Appeals of Ohio, Twelfth District	
COUNTY:	Clermont	
TOPIC:	Sales to close relative of executor are not void, but may be voidable at the election of the heirs.	20
TITLE:	<u>Verhoff v. Verhoff</u> , 2019-Ohio-3836	
COURT:	Court of Appeals of Ohio, Third District	
COUNTY:	Allen	

CONCEALMENT

TOPIC:	Hearsay exceptions and burden of proof in concealment action.	26
TITLE:	<u>Estate of DeChellis v. DeChellis</u> , 2019-Ohio-3078	
COURT:	Court of Appeals of Ohio, Fifth District	
COUNTY:	Stark	
TOPIC:	A concealment action cannot be brought for assets that never belonged to an estate.	26
TITLE:	<u>Vari v. Coppola</u> , 2019-Ohio-3475	
COURT:	Court of Appeals of Ohio, Seventh District	
COUNTY:	Mahoning	
TOPIC:	Under Evid. R. 803(3), a decedent’s statements regarding a party’s future inheritance are admissible.	27
TITLE:	<u>Pirock v. Crain</u> , 2020-Ohio-869	
COURT:	Court of Appeals of Ohio, Eleventh District	
COUNTY:	Trumbull	
TOPIC:	Debts owed to a decedent at time of death are assets of an estate and the probate Court has jurisdiction to claims of their concealment.	28
TITLE:	<u>Matter of Estate of Bolog</u> , 2019-Ohio-4083	
COURT:	Court of Appeals of Ohio, Seventh District	
COUNTY:	Mahoning	

TRANSFERS ON DEATH

TOPIC:	Power of Attorney must expressly allow changing of beneficiaries on accounts for the change to be valid.	29
TITLE:	<u>Hillier v. Fifth Third Bank</u> , 2020-Ohio-3679	
COURT:	Court of Appeals of Ohio, Second District	
COUNTY:	Miami	

TOPIC:	Pursuant to R.C. 2111.04 (D), a transfer on death affidavit signed after notice of application for guardianship and before the hearing is not valid and void as a matter of law.	29
TITLE:	<u>Estate of Gravis v. Coffee</u> , 2019-Ohio-2806	
COURT:	Court of Appeals of Ohio, Ninth District	
COUNTY:	Summit	
TOPIC:	Testamentary capacity and undue influence judgments will be upheld unless against the manifest weight of evidence.	30
TITLE:	<u>Stanek v. Stanek</u> , 2019-Ohio-2841	
COURT:	Court of Appeals of Ohio, Second District	
COUNTY:	Greene	
TOPIC:	Decedent's TOD designation is valid even if under an out of state guardianship	30
TITLE:	<u>Lomelino v. Lomelino</u> , 2020-Ohio-1645	
COURT:	Court of Appeals of Ohio, Second District	
COUNTY:	Montgomery	
TOPIC:	Summary judgment improper where a deed is delivered, but not signed before the beneficiary's death	31
TITLE:	<u>Catley v. Boles</u> , 2020-Ohio-240	
COURT:	Court of Appeals of Ohio, Eleventh District	
COUNTY:	Geauga	

FRIVOLOUS CONDUCT

TOPIC:	Frivolous conduct that impedes an estate administration can result in sanctions including difference in legal fees with and without the frivolous conduct.	33
TITLE:	<u>In re Estate of O'Toole</u> , 2019-Ohio-4165	
COURT:	Court of Appeals of Ohio, Eighth District	
COUNTY:	Cuyahoga	
TOPIC:	Filing an Application for Guardianship without an expert evaluation is not frivolous conduct.	34
TITLE:	<u>In re Guardianship of Calvey</u> , 2020-Ohio-4221	
COURT:	Court of Appeals of Ohio, Eighth District	
COUNTY:	Cuyahoga	

GUARDIANSHIPS

APPOINTMENT AND REMOVAL OF GUARDIAN

TOPIC:	R.C. 211.02(C) does not require a hearing when a guardian is not appointed.	35
TITLE:	<u>Matter of Guardianship of Weimer</u> , 2019-Ohio-4295	
COURT:	Court of Appeals of Ohio,	
COUNTY:	Montgomery	
TOPIC:	Appointment of applicant willing to fulfill wards wishes to live in his home over other applicants is proper.	36
TITLE:	<u>In re Guardianship of Keane</u> , 2020-Ohio-1105	
COURT:	Court of Appeals of Ohio, Seventh District	
COUNTY:	Carroll	

TOPIC:	Probate court has discretion to remove guardians.	37
TITLE:	<u>Matter of Guardianship of A.R.R., 2019-Ohio-3066</u>	
COURT:	Court of Appeals of Ohio, Tenth District	
COUNTY:	Franklin	
TOPIC:	The standard to remove a guardian is not whether another person would make an appropriate or better guardian, but whether there is good cause to remove the guardian.	37
TITLE:	<u>Matter of B.E.V., 2019-Ohio-3153</u>	
COURT:	Court of Appeals of Ohio, Eleventh District	
COUNTY:	Lake	
TOPIC:	Courts not required to appoint next of kin or those with familial ties as guardians.	37
TITLE:	<u>Matter of Guardianship of Cooper, 2019-Ohio-3526</u>	
COURT:	Court of Appeals of Ohio, Second District	
COUNTY:	Champaign	
TOPIC:	No abuse its discretion in ordering guardianship even though guardianship terminated after only two months.	38
TITLE:	<u>In re Guardianship of Vacca, 2020-Ohio-1482</u>	
COURT:	Court of Appeals of Ohio, Fifth District	
COUNTY:	Fairfield	
TOPIC:	Retaining Guardian of estate was in the Wards best interest where no financial mismanagement was found.	38
TITLE:	<u>In re Guardianship of Rahbek, 2020-Ohio-3223</u>	
COURT:	Court of Appeals of Ohio, Third District	
COUNTY:	Shelby	

LIFE INSURANCE

TOPIC:	R.C. 5815.33 does not automatically revoke ex-spouse as beneficiary if evidence of the intent of the decedent is for ex-spouse to remain beneficiary	39
TITLE:	<u>Durbin v. Life Ins. Co. et al., 2018 CV 0059</u>	
COURT:	Common Pleas Court, Probate Division	
COUNTY:	Summit	
TOPIC:	Change of beneficiary form ten days before insured's death is questionable enough to justify a dispute.	39
TITLE:	<u>Texas Life Insurance Company, Plaintiff-Appellee, v...., 2020-Ohio-570</u>	
COURT:	Court of Appeals of Ohio, Eighth District	
COUNTY:	Cuyahoga	

NAME CHANGE

TOPIC: The trial court is acting within its discretion to require the party seeking the name change to show that it is in the child's best interest 40
TITLE: In re M.J., 2019-Ohio-2065
COURT: Court of Appeals of Ohio, Third District
COUNTY: Auglaize
DATE: May 28, 2019

TOPIC: Name change dismissed if no reasonable cause for the change. 41
TITLE: In re the Name Change of S.D.L., 2019-Ohio-2950
COURT: Court of Appeals of Ohio, Sixth District
COUNTY: Huron

TOPIC: Name change applications are a special statutory proceeding where service by publication is governed by R.C. 2717.01, not Civil Rules. 42
TITLE: Name Change of Rowe, 2019-Ohio-4666
COURT: Court of Appeals of Ohio, Fourth District
COUNTY: Scioto

TOPIC: Name change determination will be upheld if the trial court considered the relevant factors where father wanted step father to adopt and not just change name. 42
TITLE: In re K.C.M., 2019-Ohio-5182
COURT: Court of Appeals of Ohio, Fifth District
COUNTY: Fairfield

POWERS OF ATTORNEY

TOPIC: Relief from judgement appropriate when party signed as POA, not as individual. 62
TITLE: Pristine Senior Living v. Mistler, 2020-Ohio-416
COURT: Court of Appeals of Ohio, Twelfth District
COUNTY: Butler

PROBATE PROCEDURE

TOPIC: *Res Judicata* bars an appeal claim nine years after the judgment. 43
TITLE: Matter of Fischer, 2019-Ohio-4749
COURT: Court of Appeals of Ohio, Fifth District
COUNTY: Morgan

TOPIC: Probate court does not have jurisdiction over annulments brought by a guardian on behalf of a ward. 43
TITLE: Nixon v. Day, 2019-Ohio-3335
COURT: Court of Appeals of Ohio, Fifth District
COUNTY: Tuscarawas

TOPIC: A trial court may not consider a motion for visitation when the motion does not comply with proper service of process. 44
TITLE: In re Guardianship of Gelsinger, 2019-Ohio-4584
COURT: Court of Appeals of Ohio, Eighth District
COUNTY: Cuyahoga

TOPIC:	A bank is not required to place restrictions on an account when the only court orders they received did not restrict the funds.	44
TITLE:	<u>In re B.M.</u> , 2020-Ohio-1150	
COURT:	Court of Appeals of Ohio, Seventh District	
COUNTY:	Jefferson	
TOPIC:	Mistaken designation of an affirmative defense can be considered as a counterclaim under Civ.R. 8 (C).	47
TITLE:	<u>James E. Murphy, JR., et al., Plaintiffs-Appellants, v.....</u> 2020-Ohio-163	
COURT:	Court of Appeals of Ohio, Eleventh District	
COUNTY:	Trumbull	
TOPIC:	Contempt finding proper for failure to comply with probate court order and absent a transcript the finding must be affirmed.	48
TITLE:	<u>In re Estate of Jackson</u> , 2020-Ohio-4334	
COURT:	Court of Appeals of Ohio, Sixth District	
COUNTY:	Erie	
DATE:	September 4, 2020	

PERSONAL JURISDICTION

TOPIC:	Receiving a check with an Ohio address is not enough to establish personal jurisdiction under the long arm statute.	47
TITLE:	<u>Schwab v. Wallace</u> , 2020-Ohio-560	
COURT:	Court of Appeals of Ohio, Fifth District	
COUNTY:	Stark	
TOPIC:	Internet Search not a mandatory prerequisite to establish reasonable diligence for service by publication	48
TITLE:	<u>Corrao v. Bennett</u> , 2020-Ohio-2822	
COURT:	Court of Appeals of Ohio, Eighth District	
COUNTY:	Cuyahoga	

ATTORNEYS AS WITNESSES

TOPIC:	Trial court may not summarily limit the participation of attorneys even if they are likely to be witnesses at trial.	45
TITLE:	<u>Krueger v. Willowood Care Ctr. of Brunswick, Inc.</u> , 2019-Ohio-3976	
COURT:	Court of Appeals of Ohio, Ninth District	
COUNTY:	Medina	
DATE:	September 30, 2019	
TOPIC:	A two part analysis must be used to disqualify an attorney under Prof.Cond.R. 3.7.	46
TITLE:	<u>In re Estate of Tuttle</u> , 2019-Ohio-5363	
COURT:	Court of Appeals of Ohio, Sixth District	
COUNTY:	Erie	
TOPIC:	Deny motion to admit out-of-state counsel where counsel is a necessary witness at trial.	46
TITLE:	<u>Krugliak, Wilkins, Griffiths & Daughtery Co. L.P.A., v. Lavin</u> , 2020-Ohio-3123	
COURT:	Court of Appeals of Ohio, Fifth District	
COUNTY:	Stark	

STRUCTURED SETTLEMENTS

TOPIC:	Trial court must hold a hearing on an application for approval in advance of transfer of payment rights.	62
TITLE:	<u>In re O'Dell</u> , 2019-Ohio-3987	
COURT:	Court of Appeals of Ohio, Third District	
COUNTY:	Hancock	

TRUSTS

TOPIC:	Trustee duty to report in a revocable trust is only to the settlor while the settlor is living.	49
TITLE:	<u>Hasselbring v. Bernard</u> , 2019-Ohio-2812	
COURT:	Court of Appeals of Ohio, First District	
COUNTY:	Hamilton	

TOPIC:	A settlement agreement must serve the Trust's purpose and provide benefit to the beneficiaries.	49
TITLE:	<u>Matter of Roudebush</u> , 2019-Ohio-3955	
COURT:	Court of Appeals of Ohio, Seventh District	
COUNTY:	Carroll	

TOPIC:	Trust clearly granted surviving settlor the authority to revoke and withdraw assets.	50
TITLE:	<u>McCoy v. McCoy</u> , 2019-Ohio-5227	
COURT:	Court of Appeals of Ohio, Fifth District	
COUNTY:	Guernsey	

TOPIC:	A prior settlement agreement was proof of constructive knowledge of possible breach sufficient to trigger statute of limitations under R.C. 5810.05.	51
TITLE:	<u>Helton v. Fifth Third Bank</u> , 2019-Ohio-5208	
COURT:	Court of Appeals of Ohio, First District	
COUNTY:	Hamilton	

TOPIC:	Gift balancing clause results in brother having no evidence of owning trust assets which is necessary for a conversion claim.	52
TITLE:	<u>Hutchings v. Hutchings</u> , 2019-Ohio-5362	
COURT:	Court of Appeals of Ohio, Sixth District	
COUNTY:	Sandusky	

TOPIC:	An inter vivos trust that does not expressly exclude adult adopted persons does not mean that settlor intended to include adult adoptees as beneficiaries.	52
TITLE:	<u>KeyBank National Association v. Firestone</u> , 2019-Ohio-2910	
COURT:	Court of Appeals of Ohio, Eighth District	
COUNTY:	Cuyahoga	

TOPIC:	Childs caregiver role and help in drafting trust not enough for confidential relationship. Forfeiture clause in trusts apply to challenges to trust amendments.	53
TITLE:	<u>Foelsch v. Farson</u> , 2020-Ohio-1259	
COURT:	Court of Appeals of Ohio, Fifth District	
COUNTY:	Knox	

TOPIC:	Good cause for removal when trustees fail to distribute the trust at the required time.	54
TITLE:	<u>Doran v. Doran</u> , 2020-Ohio-1583	
COURT:	Court of Appeals of Ohio, First District	
COUNTY:	Hamilton	
TOPIC:	Self-serving affidavit without corroborating materials will not defeat a well-supported motion for summary judgment.	55
TITLE:	<u>Goddard v. Goddard</u> , 2020-Ohio-3372	
COURT:	Court of Appeals of Ohio, Eighth District	
COUNTY:	Cuyahoga	
DATE:	June 18, 2020	
TOPIC:	Cemetery trusts are permitted to pay the capital gains taxes using the trust's principle	55
TITLE:	<u>Crown Hill Cemetery Assn. v. Maxfield, Dir., Ohio Dept. of Commerce</u> , 2020-Ohio-3433	
COURT:	Court of Appeals of Ohio, Tenth District	
COUNTY:	Franklin	
TOPIC:	Discretionary power to spend does not allow trustees to transfer assets allocated by Will.	56
TITLE:	<u>In Re Trust Created by Item IX of the Will of Mellott</u> , 2020-Ohio-3738	
COURT:	Court of Appeals of Ohio, Seventh District	
COUNTY:	Belmont	
TOPIC:	No trust upheld when there is no evidence requiring a constructive trust or evidence that a trust was intended.	56
TITLE:	<u>Johnson v. Kuehn</u> , 2020-Ohio-3757	
COURT:	Court of Appeals of Ohio, Seventh District	
COUNTY:	Carroll	
TOPIC:	The terms of a trust prevail over a subsequently executed codicil when... Power-of-attorney must expressly authorize changes to beneficiaries of accounts.	57
TITLE:	<u>In re Estate of Zoltanski v. Zoltanski</u> , 2020-Ohio-3908	
COURT:	Court of Appeals of Ohio, Sixth District	
COUNTY:	Wood	

UNDUE INFLUENCE

TOPIC:	Undue influence in a contested will decision upheld when the facts support the application of law.	59
TITLE:	<u>Holden v. Holden</u> , 2019-Ohio-5031	
COURT:	Court of Appeals of Ohio, Twelfth District	
COUNTY:	Butler	
TOPIC:	Undue influence finding upheld when evidence of susceptibility of the testator not related to time of signing of will	60
TITLE:	<u>Wallace, et. al. v. Davies</u> , 2020-Ohio-93	
COURT:	Court of Appeals of Ohio, Ninth District	
COUNTY:	Summit	

TOPIC: Statements made referring to a past condition, state of mind, or mental feeling and do not reflect decedent's then existing state of mind are not admissible under Evid.R. 803(3). 60

TITLE: Young v. Kaufman, 2020-Ohio-3283
COURT: Court of Appeals of Ohio, Eighth District
COUNTY: Cuyahoga

TOPIC: Undue influence finding upheld when there is sufficient evidence of susceptibility of the testator and control by defendant. 60

TITLE: Yurkovich v. Kessler, 2020-Ohio-4169
COURT: Court of Appeals of Ohio, Sixth District
COUNTY: Huron

WILLS

TOPIC: Burden of proof for admitting a will to probate is on the proponent of the will to establish its validity. 57

TITLE: In re L.M.W., 2019-Ohio-3873
COURT: Court of Appeals of Ohio, Ninth District
COUNTY: Summit
DATE: September 25, 2019

TOPIC: Language used in a will is considered in deriving intent of the testator. 58

TITLE: Bills v. Babington, 2019-Ohio-3924
COURT: Court of Appeals of Ohio, Sixth District
COUNTY: Huron

TOPIC: Wills and trust docs discoverable if allegations in a counterclaim constitute waiver Of privilege and documents that are relevant to the claims. 59

TITLE: Edwards v. Edwards, 2019-Ohio-5413
COURT: Court of Appeals of Ohio, Eleventh District
COUNTY: Portage

CASE LAW UPDATE FEBRUARY 8, 2021

CASES FROM JUNE 2019 SEPTEMBER 2020 PLUS TWO EXTRA!

Judge Elinore Marsh Stormer

OHIO SUPREME COURT CASES

WILLS

TOPIC: Bequest to witness of will is void
TITLE: In re the Estate of Shaffer, 2020 –Ohio- 6672
COURT: Supreme Court of Ohio

Denial of application to probate purported handwritten will that did not comply with R.C. 2107.03 and was submitted pursuant to R.C. 2107.24 was not error since the validity of the purported will hinged on testimony of the beneficiary, and under the voiding provision of R.C. 2107.15, which applies to wills that meet formal requirements and to wills that do not meet formal requirements, the beneficiary's interest under the purported will is eliminated as a matter of law.

ADOPTIONS

TOPIC: Indigent bio parents are entitled to counsel in adoption proceedings
TITLE: In re Adoption of YFF, 2020-Ohio- 6785
COURT: Supreme Court of Ohio

In adoption proceeding, it was error to deny indigent biological mother appointment of counsel on reasoning that the adoption action was initiated by private parties since an indigent parent who opposes the termination of his or her parental rights in proceedings in juvenile court under R.C. Ch. 2151 has the statutory right to appointed counsel, but an indigent parent who opposes the termination of his or her parental rights in an adoption proceeding has no statutory right to appointed counsel, therefore the court declares that indigent parents are entitled to counsel in adoption proceedings in probate court as a matter of equal protection of the law under U.S. Const. amend. XIV and Ohio Const. Art. I, Sec. 2.

TOPIC: R.C. 5103.15 (B) (2) surrenders are outside the scope of a juvenile court authority to approve, the probate court has the authority to determine the validity of (B) (2) surrenders.

TITLE: State ex re. C.V. v. Adoption Link, Inc., 2019-Ohio-2118

COURT: Supreme Court of Ohio

DATE: May 30, 2019

C.V. the biological mother of N.V. sought writs of prohibition and habeas corpus, to vacate approval of her surrender agreement with Adoption Link, Inc., stop adoption proceedings in Greene County Probate Court, and force the return of her daughter N.V.

C.V. gave birth to a baby girl on August 10, 2018 in her bathroom. Prior to the labor, C.V. (who struggled with a history of substance abuse including heroin) did not know she was pregnant. Within 76 hours of birth, C.V. signed a permanent surrender custody agreement with Adoption Link, Inc. The Greene County Juvenile Court judge signed a judgment entry the next day finding that “C.V. had entered into the agreement knowingly and voluntarily, granting Adoption link permanent custody and terminating C.V’s parental rights.”

C.V. twice moved to revoke the surrender with the Hamilton County Probate Court, and Greene County Juvenile Court then filed this action with Ohio Supreme Court.

The Court held that R.C. 5103.15 (B) (2) “agreements with private child-placing agreements for the placement of children under six months of age for the sole purpose of adoption —the agency is not required to seek and the juvenile court has no authority to grant approval of the agreement.” The Court held since (B) (2) surrenders do not involve the request for approval, the juvenile court’s role is ministerial, and the approval is out of the scope of its authority. Based on this finding, the Court approved the writ of prohibition against the Greene County Juvenile Court judge and vacated his judgment entry.

However, the Court denied the writ of habeas corpus on the grounds that C.V. has an adequate remedy if she chooses to intervene in the probate court adoption proceeding. The Court also denied the writ of prohibition against the Greene County Probate Court judge because the probate court has statutory jurisdiction to decide whether the consent for surrender is valid and original and exclusive jurisdiction over adoption proceedings.

TOPIC: Parent’s nonsupport of minor child pursuant to a zero-support order provides “justifiable cause” and requires parental consent to adoption.

TITLE: In re Adoption of B.I., 2019-Ohio-2450

COURT: Supreme Court of Ohio

DATE: June 25, 2019

Stepfather petitioned to adopt stepchild without Father’s consent, the probate court dismissed the application, and the appeals court affirmed. Father entered prison in 2009 where he remained during the year before adoption filed. In 2010, at Mother’s request the Clermont County Juvenile Court granted termination of the child support order and reduced Father’s arrearages to zero.

The probate court magistrate held that even though Father was not subject to a child support order, he still had available money that could be used to meet an obligation to provide some support within his means. The magistrate found that since father had provided no support from these means, in the year prior, his consent was not needed.

The probate court overruled the magistrate holding that a zero-support order provides justifiable cause for failing to provide maintenance and support under R.C. 3107.07 (A). The appeals court affirmed holding that a zero support order “supersedes any other duty of support required by law.”

The Ohio Supreme Court held that if a court has issued a decree relieving a parent of any child support order, there is no separate obligation that arises under law where a parent would still be required to provide maintenance and support to the child.

TOPIC: The plain language of R.C. 3107.07 (A) requires a parent pay support as ordered in a judicial decree. Partial payment not enough for consent
 TITLE: In re Adoption of A.C.B., 2020-Ohio-629
 COURT: Supreme Court of Ohio
 COUNTY: Appeal from the Court of Appeals for Lucas County
 DATE: February 26, 2020

The Ohio Supreme Court affirmed the decisions of the appellate and trial courts finding a father’s consent was not necessary when he had failed to pay support as ordered by judicial decree. (That it was unjustified was not disputed, father admitted he simply chose not to pay.) The Court held that the language of R.C. 3107.07 (A) is unambiguous, that a parent must provide maintenance “as required by law or judicial decree.” The Court found the decree laid out exactly what father was required to pay, \$85 a week totaling \$4,420 per year. Therefore his single \$200 payment days before the adoption petition was not satisfactory.

COURTS OF APPEAL

MAINTENANCE AND SUPPORT OF CHILD

TOPIC: Neither absence of a child support order or custodial parent’s failure to request support constitute justifiable cause.
 TITLE: Matter of Adoption of A.L.R., 2019-Ohio-4320
 COURT: Court of Appeals of Ohio, Eleventh District
 COUNTY: Geauga
 DATE: October 21, 2019

Dylan Jones appealed the trial court decision that his consent was not required for the adoption of his biological daughter A.L.R. Jones admitted he had not provided for maintenance and support in the year prior to the adoption petition, but argued that since there was no child support order and custodial parent had not requested support, he had justifiable cause. The appellate court disagreed

and upheld the decision finding that a natural parent has a duty to provide support regardless of whether there was a request to do so, and even in the absence of an order to do so.

TOPIC: Duty to provide support is valid regardless of a lack of a court order for support.
 TITLE: In Re Adoption of J.J.P., 2020-Ohio-679
 COURT: Court of Appeals of Ohio, Eighth District
 COUNTY: Cuyahoga
 DATE: February 27, 2020

Mother and Father are the biological parents of J.J.P. born January 2015. In May 2015, Father suffered a drug overdose but survived and paternal grandparents were subsequently granted legal custody of J.J.P. who had lived in their home since his birth. Father died of an overdose on October 4, 2017. Grandparents filed a petition for adoption on October 5, 2018 and Mother objected. The record showed that Mother had not provided any monetary support, clothing, or gifts for one year prior. Mother did not deny the lack of support but reasoned that there was no support order.

The trial court found that Mother's consent was not required because she had not provided any support or maintenance for one year prior to the adoption petition. The trial court held that the duty to support existed regardless of the lack of court ordered support. Mother appealed. The appellate court upheld the decision of the trial court stating that it was supported by credible evidence and not against the manifest weight of evidence.

TOPIC: Consent is not required when failure to provide maintenance and support.
 TITLE: In the Matter of Adoption of F.L.S., 2020-Ohio-936
 COURT: Court of Appeals of Ohio, Fourth District
 COUNTY: Hocking
 DATE: March 8, 2020

Mother appealed the decision of the trial court that her consent was not required for the adoption of her child. The appellate court upheld because the facts showed credible evidence that Mother had failed without justifiable cause to provide maintenance or support or have more than de Minimis contact.

TOPIC: Consent is not required when failure to provide maintenance and support.
 TITLE: In re Adoption of O.B.J., 2020-Ohio-4148
 COURT: Court of Appeals of Ohio, Twelfth District
 COUNTY: Warren
 DATE: August 24, 2020

Mother's consent to adoption was not required because she failed, without justifiable cause, to provide support and maintenance to the child for the one year preceding the adoption petition. While Mother's means to provide support may have been limited, it was not justifiable for her to offer nothing on behalf of O.J.B.

TOPIC: No consent required if parent pays only a portion required by judicial decree
 TITLE: In Re L.R.O., 2020-Ohio-3200
 COURT: Court of Appeals of Ohio, Second District
 COUNTY: Darke
 DATE: June 5, 2020

Custodial Grandmother appeals judgment which found that Mother consent for adoption was required. Grandparents were awarded permanent custody of the children in 2013 and in 2018 filed the petition to adopt them. The trial court found that there was justifiable cause for failure because Mother tried to make contact via mail, text message, and Facebook Messenger and Grandparents blocked these efforts. The appeals court sustained the probate courts judgment

The appeals court reversed the probate courts finding that Mother consent was required because she made some child support payments during the statutory period. The appeals court ruled that Mother must pay the full child support as required by law or judicial decree. Pay only a portion of the required child support will not satisfy the requirement that the parent provide maintenance and support as required by law or judicial decree.

TIME FOR OBJECTION

TOPIC: Statute requiring objection within 14 days of notice of adoption petition does not violate Due Process Clause of the 14th Amendment.
 TITLE: In re Adoption of N.F., 2019-Ohio-5380, and In re Adoption of A.B., 2019-Ohio-5383
 COURT: Court of Appeals of Ohio, Third District
 COUNTY: Logan
 DATE: December 30, 2019

The appellate court upheld the decision of the trial court finding Father's consent was not required where he failed to object to the adoption within 14 days of notice pursuant to R.C. 3107.06. On appeal, Father challenged the constitutionality of the law, but the Appellate court held that the statute did not violate the Due Process Clause of the 14th Amendment.

TOPIC: Consent not necessary if party fails to object within 14 days of being served.
 TITLE: In re Adoption of M.A.S., 2020-Ohio-3603
 COURT: Court of Appeals of Ohio, Twelfth District
 COUNTY: Clinton
 DATE: July 6, 2020

The appellate court upheld the decision of the trial court finding Father's consent was not required where he failed to object to the adoption within 14 days of notice pursuant to R.C. 3107.06.

TOPIC: Consent not necessary if required party fails to object within 14 days of being served.
 TITLE: In re A.M.G.H., 2020-Ohio-534
 COURT: Court of Appeals of Ohio, Twelfth District
 COUNTY: Clermont
 DATE: February 18, 2020

Maternal grandparents sought to adopt their grandchild A.M.G.H. Mother's consent was not required because she was deceased. Initially, the magistrate found that Father's consent was required because he had maintained more than de minimis contact in the year prior. However, Father had never objected to the adoption petition, so the probate court issued final judgment that Father's consent was not required under R.C. 3107.07 (K) requiring an objection within 14 days of notice of the petition. Father then responded with a handwritten letter objecting to the proceedings. Father appealed the decision alleging that he should not be held to the statutory requirements because the adoption petition was invalid on its face by asserting that he had not had de minimis contact. The appellate court rejected this argument holding that R.C. 3107.07 applied because he was a person whose consent would be required for the adoption, not because of the grandparents' claims about his contact. The judgment was affirmed.

CONSENT NOT REQUIRED – CONTACT

TOPIC: No Justifiable lack of contact where Father did not use all available sources
 TITLE: In Re C.D.G., 2020-Ohio-2959
 COURT: Court of Appeals of Ohio, Second District
 DATE: May 15, 2020

Father appeals decision that he did not have justifiable cause for lack of contact for the statutory period. Mother moved from California to Ohio and soon after changed her phone number. The trial court reasoned Father had other ways of contacting her, including email and Maternal Grandmother's phone number. Father also never searched public records to find Mother's address or reached out on social media. The appeals court also determined that it was Paternal Grandmother, not Father, who was primarily involved in attempting to contact the children. The appeals court affirmed the trial court's findings and concluded that there was a pattern of ambivalence and lack of individual effort by Father to have contact with the children.

TOPIC: Two letters and a Christmas card sent after petitions for adoption were filed sufficient for a finding of de minimis contact only
 TITLE: Matter of K.M.F., 2019-Ohio-2451
 COURT: Court of Appeals of Ohio, Fourth District
 COUNTY: Highland
 DATE: June 12, 2019

P.F. and L.F. filed petitions to adopt two minor children placed in their custody for seven months. They asserted that bio mom agreed to the adoption, and the father's consent was not required because he had failed without justifiable cause to provide more than de minimis contact or support for at least one year prior. J.T. (Appellant) the biological father had no contact with the children

since March 2017. After the filing of the petitions to adopt, J.T. sent two letters and a Christmas card.

Both biological mother and father were at the time incarcerated on involuntary manslaughter charges relating to a drug overdose. J.T. objected to the adoption claiming his lack of contact was due to the petitioners' refusal to allow him contact, but he did not provide any evidence of this obstruction.

The trial court found that appellant had the means to send letters before the petitions, but chose not to. The trial court found no justifiable cause for his de minimis contact, and granted the adoption petitions, further finding the adoptions were in the best interest of the children.

J.T. appealed with the contention that the trial court had erred in finding that he lacked justifiable cause for the de minimis contact. The Appellate Court affirmed

TOPIC: Father's consent is not required if one phone call in 3 years
 TITLE: In re Adoption of L.B.R., 2019-Ohio-3001
 COURT: Court of Appeals of Ohio, Second District
 COUNTY: Clark
 DATE: July 26, 2019

The trial court found that Father's consent was not needed for the adoption of his children because he had failed to provide more than de minimis contact for the year preceding the petition. The Appeals Court affirmed. It was not against the manifest weight of the evidence because Father had not visited or communicated with the children in almost three years except one communication to Mom to say "Happy Birthday" to one of the kids.

TOPIC: Mother's consent is not required when no attempt to contact for 5 years
 TITLE: In re S.A.N., 2019-Ohio-3055
 COURT: Court of Appeals of Ohio, Twelfth District
 COUNTY: Warren
 DATE: July 29, 2019

The trial court found that Mother's consent was not needed for the adoption of her child because she had failed to provide more than de minimis contact for the year preceding the petition. The Appeals Court affirmed. It was not against the manifest weight of the evidence because Mother had no contact with the child in five years. Mother's assertion that she did not have Grandmother's contact information was rejected because Grandmother had not concealed the information, rather Mother did not attempt to gain the information.

TOPIC: No justifiable cause for the father's failure to have contact with son.
 TITLE: Matter of Adoption of N.I.B., 2019-Ohio-4412
 COURT: Court of Appeals of Ohio, Eleventh District
 COUNTY: Ashtabula
 DATE: October 28, 2019

The appellate court upheld the trial court's finding that Father's consent was not needed for the adoption of his child. Father had not had any contact with his son for at least one year. The trial court's factual findings were not against the manifest weight of evidence.

TOPIC: Contempt motion with the juvenile court does not count as contact with the child.
 TITLE: In Re: the Adoption of: L.S. [Cody Schoonover..., 2020-Ohio-224
 COURT: Court of Appeals of Ohio, Third District
 COUNTY: Hancock
 DATE: January 27, 2020

The Appellate court upheld the decision of the trial court finding that Father's consent was not necessary. The trial court's finding was not against the manifest weight of evidence where the only contact Father brought as evidence was a contempt motion filed with the juvenile court that complained about Mother's interference with visitation. The trial court found this was contact with the court, not the child. Father admitted that he had not called, texted, wrote letters, sent gifts, or any other type of contact with his son in the year before the adoption petition.

TOPIC: No contact order entered voluntarily does not provide justification for less than de
 Minimis contact
 TITLE: In Re Adoption of T.U., 2020-Ohio-841
 COURT: Court of Appeals of Ohio, Sixth District
 COUNTY: Williams
 DATE: March 6, 2020

Father appealed the decision of the probate court that his consent was not required for step-father to adopt his children. There was no question that Father had not paid child support or had more than de Minimis contact with the children for five years. However, Father argued that the zero support order and no contact order from the domestic relations court offered justifiable cause. The appellate court agreed with the zero support order being justifiable cause based on the Supreme Court's decision in In Re Adoption of B.I., 2019-Ohio-2450. However, the appellate court did not agree that the no contact order was justifiable cause because Father had voluntarily agreed to the order (in exchange for zero support), and the court distinguished this from a party involuntarily subjected to this type of order.

TOPIC: No contact order resulting from conviction for endangering child is not justifiable cause.
 TITLE: In Re the Adoption of C.H.B., 2020-Ohio-979
 COURT: Court of Appeals of Ohio, Third District
 COUNTY: Crawford
 DATE: March 16, 2020

Father appealed the decision of the trial court that the no contact order was not justifiable cause for his not having more than de Minimis contact with his child and therefore his consent was not required for maternal grandparents to adopt. The appellate court upheld the decision agreeing with the trial court that Father's voluntary and violent criminal conduct had resulted in the no contact order and where he was convicted of two counts of felony child endangering and serious physical harm against the child in question, he should not reap any benefits of his resulting no contact order.

CONSENT REQUIRED

TOPIC: Lack of contact justifiable when reliance on a court order of no contact.
 TITLE: In re Adoption of A.K., 2020-Ohio-3279
 COURT: Court of Appeals of Ohio, Eighth District
 COUNTY: Cuyahoga
 DATE: June 11, 2020

In April 2007, Father was sentenced to 23 years in prison after pleaded guilty to the murder of his wife, the mother of A.K. and C.K. In 2006, the juvenile division issued an order prohibiting Father from having any contact with his daughters. The kids were placed with their Grandparents who petitioned for adoption without the consent of Father. The probate court determined there was no justifiable cause for Fathers failure to have contact

The appellant court reversed relying on the ruling of In re Adoption of B.I., 157 Ohio St.3d 29, which decided that a parent's nonsupport pursuant to a judicial decree does not extinguish the requirement of that parent's consent to the adoption of the child. The appeals court ruled the same reasoning applies to an order involving a parent's contact with their child. Holding that reliance on a court order constitutes justifiable cause. Father's lack of contact was justifiable because it was a direct consequence of his reliance on a valid court order.

TOPIC: Consent required when mom trying to get it together
 TITLE: Matter of Adoption of L.G., 2019-Ohio-4410
 COURT: Court of Appeals of Ohio, Fifth District
 COUNTY: Guernsey
 DATE: October 15, 2019

The trial court found that mother's consent was required for step-mother to adopt because although mother had not paid support for one year, incarceration and drug rehabilitation were justifiable causes. The appellate court upheld the decision of the trial court because its finding was not against the manifest weight of evidence.

TOPIC: Silence to attempts to make contact is interference and discouragement that demonstrate justifiable cause.
 TITLE: In re A.L.H., 2020-Ohio-3527
 COURT: Court of Appeals of Ohio, Ninth District
 COUNTY: Medina
 DATE: June 30, 2020

Stepmother appeals the trial court's judgment finding Mother's consent was required for adoption. The trial court found that she had no contact with the child for the statutory period but Mother demonstrated justifiable cause based on significant interference and discouragement by Father. Father told Mother that all communication had to go through him, then he got a new phone number and did not tell Mother. Father also blocked Mother on Facebook Messenger. Mother text messages were admitted into evidence and showed multiple attempts by Mother to make contact. Mother also filed a motion in the domestic relations court to enforce her parenting time. The Appeals court agreed that Mother made multiple attempts to have contact with the children and that Father systematically deprived Mother of any ability to see or talk to the child.

TOPIC: Significant interference with visitation by a custodial parent qualifies as justifiable cause for non-custodial parent's failure of contact.
 TITLE: Matter of Adoption of J.R.J., 2019-Ohio-4701
 COURT: Court of Appeals of Ohio, Second District
 COUNTY: Darke
 DATE: November 15, 2019

The Appellate court upheld the trial court's finding that Mother had interfered with visitation and this qualified as justifiable cause for father's lack of contact and the court's finding that Father's consent for adoption was therefore necessary.

TOPIC: Gifts and mail from prison enough for de minimis contact
 TITLE: In Re Adoption of C.A.H., 2020-Ohio-1260
 COURT: Court of Appeals of Ohio, Fifth District
 COUNTY: Knox
 DATE: March 31, 2020

Maternal grandparents applied to adopt their minor grandson in April 2019 and Father objected. Grandparents have had custody since Child's birth in 2011. Father was incarcerated two weeks after Child's birth and is set for release in 2021. Grandparents testified that they received no mail from Father during the look back period and never received any financial support. Father testified he has mailed a letter to the Child every month since incarceration. He also sent presents through the Angel Tree Project. In December 2018 he purchased a large envelope to mail the Child a drawing and sent a second drawing in February 2019. Father stated he earns \$20 per month and \$4.50 is withheld for child support.

The trial court found that Grandparents failed to prove Father did not have more than de minimis contact and Father did not provide maintenance and support for the child. The trial court determined Father consistently sent Christmas gifts and mailed letters to the child. Upon review,

the appeals court agreed that Father provided more than de minimis contact. The trial court found that Father provided support as required by judicial decree. Father was ordered to pay child support of \$2.06/ month and paid approximately \$5.00/month. Upon review, the appeals court found the trial court did not err in finding that Father provided support as required by judicial decree

TOPIC: Consent is required for adoption by maintaining contact through phone calls, gifts, and cards.
 TITLE: In Re Adoption of S.L.P., 2020-Ohio-495
 COURT: Court of Appeals of Ohio, Eighth District
 COUNTY: Cuyahoga
 DATE: February 13, 2020

Biological parents consented to the appointment of N.G. (father's aunt) as guardian of their child S.L.P. due to their ongoing financial difficulties. Mother and Father continued to have contact with their child. In June 2016, the relationship between the biological parents ended and Father died in 2017. Mother believed her visitation was being hindered by the guardian, and on March 1, 2018 filed a motion to terminate the guardianship. N.G. filed a petition for adoption one month later. Mother objected and a hearing was held on April 22, 2019.

The trial court found that Mother had maintained contact with her child through numerous phone calls, gifts, and cards. Evidence showed that Mother had difficulty with visitation when her calls seeking visitation were not answered or returned. The trial court found that Mother was not under any support order, had minimal income, and had provided some necessities such as clothing, scarves, hats, umbrella, and fast food certificates. The trial court determined that mother's consent to the adoption was required and dismissed the petition for adoption. The appellate court did not find any error in the trial court's findings and upheld the decision.

TOPIC: Justifiable cause existed for lack of contact where mom tied visits to \$\$
 TITLE: In re N.R.H.N., 2020-Ohio-4266
 COURT: Court of Appeals of Ohio, Twelfth District
 COUNTY: Clermont
 DATE: August 31, 2020

The trial court did not err in determining that justifiable cause existed for father's failure to communicate with his children in the one year preceding an adoption petition by the children's stepfather. Without a visitation order, the father was dependent on the mother to allow visitations. The mother gave the father the impression that if he did not contribute additional money for the children, he would not be allowed to visit.

TOPIC: Parent that is prevented from seeing child and who is up to date on child support provided more than de minimis contact.
 TITLE: In re Adoption of B.T.R., 2020-Ohio-2685
 COURT: Court of Appeals of Ohio, Fifth District
 COUNTY: Morrow
 DATE: June 29, 2020

Petitioner filed a step-parent petition for adoption of the minor child, B.T.R.. Respondent filed an objection arguing that he had fulfilled his fiscal support obligations but had been barred from having any contact with his child or from even knowing where the child resides. The parties stipulated that he was current in paying child support. The trial court concluded the hearing without testimony from the Petitioner because the court determined, based on Respondent's testimony, that his consent was necessary to proceed with the adoption.

Petitioner appealed claiming the trial court erred when it determined that Respondent payment of child support constituted more than de minimis contact. The appeals court found that Respondent provided for the support for the Child as required by judicial decree and his consent to the adoption was necessary

BEST INTEREST

TOPIC: Adoption not in the best interest of the child where the adoption assessor recommended the adoption but failed to investigate father or his family, and mother had refused visits with father or his family despite court ordered visitation.
 TITLE: In re Adoption of L.G., 2019-Ohio-2422
 COURT: Court of Appeals of Ohio, Sixth District
 COUNTY: Sandusky
 DATE: June 19, 2019

Stepfather of L.G. appealed the denial of his adoption because it was not in the best interest of the child. At trial, the adoption assessor recommended the adoption but revealed in her testimony that she had not interviewed the father or anyone on his side of the family. The only information the assessor obtained regarding father came from her interviews with mother and stepfather.

Father objected to the adoption and maintaining he wanted to continue his relationship with L.G.. Trial testimony revealed that mother had refused visitation with father for over a year despite the court ordered visitation rights. Incarcerated three times in the last three years for several months each time, Father also suffered from various medical issues (such as MS and a traumatic brain injury) which impeded his ability to work. Father's doctor testified that his medical difficulties would not prevent him from caring for his daughter.

The trial court found father's consent was not necessary because he had failed to provide support for L.G. in the year prior. Therefore, the probate court based its opinion on the best interest of the child. The probate court held that it was in the best interest of the child to have a relationship with both sides of her family. The Appeals Court upheld the decision and found that the trial court

had “properly considered the relevant best interest factors, weighed the evidence and ascertained the witnesses’ credibility.”

TOPIC: Adoption by step dad denied when evidence showed it was in the best interest of the child to continue biological father’s involvement in his life.
 TITLE: Matter of Adoption of P.K.H., 2019-Ohio-2680
 COURT: Court of Appeals of Ohio, Fourth District
 COUNTY: Scioto
 DATE: June 19, 2019

Stepfather appealed the denial of his petition to adopt stepson P.K.H. Biological father’s consent was not necessary under R.C. 3107.07 (K) because he filed his objection 11 days late. Bio father maintained medical insurance for the child while deployed three separate times on active military duty. Both bio parents had an informal visitation arrangement that worked until May 2014 when bio mom cut off contact and did not allow visitation. Evidence showed that although stepfather had a great relationship with P.K.H. since he was six months old, there was also a lot of benefit from the relationship with his bio father including contact with half- brother. Accordingly, the appellate court upheld the decision and held that the adoption is not the “least detrimental” option for P.K.H.’s growth and development.

TOPIC: Adoption not in the best interest of the child upheld where the court found benefit to restoring relationship with bio dad
 TITLE: Matter of Adoption of K.M.T., 2019-Ohio-4988
 COURT: Court of Appeals of Ohio, Fifth District
 COUNTY: Licking
 DATE: December 2, 2019

The appellate court upheld the trial court’s decision that adoption was not in the best interest of the child. The trial court found it was in the best interest of the child to restore the relationship with natural father and paternal grandmother. The trial court’s findings were not against the manifest weight of evidence.

PROCEDURE

TOPIC: A trial court may not take judicial notice of proceedings from other cases even when it involves the same parties and the same judge.
 TITLE: Matter of Adoption of P.R.K., 2019-Ohio-5389
 COURT: Court of Appeals of Ohio, Fifth District
 COUNTY: Ashland
 DATE: December 26, 2019

The probate court dismissed step-Grandmother’s petition to adopt finding that Mother’s consent was required. The basis for this decision came from findings in a separate juvenile case involving the same parties and judge. The Appellate court reversed and remanded finding a court cannot take notice of proceedings from another case even in its own judgment entries.

TOPIC: Grandparents are not subject to a pre-adoptive approval process.
 TITLE: Matter of Adoption of G.M.B., 2019-Ohio-3884
 COURT: Court of Appeals of Ohio, Fourth District
 COUNTY: Pickaway
 DATE: September 19, 2019

Maternal grandmother applied to adopt grandchildren who had been placed in legal custody of their maternal grandfather. In March 2019, the trial court dismissed Grandmother's petitions concluding that she lacked standing because she did not have placement of the children in her home.

Grandmother appealed arguing that R.C. 5103.16 (E) does not require a grandparent to have placement in the home to file an adoption petition. The appellate court agreed that R.C. 5103.16 (D) was inapplicable to the facts and R.C. 5103.16(E) "expressly exempts grandparents from the pre-adoptive approval process. The appellate court reversed and remanded.

TOPIC: A consenting parent must understand the effect of consent in an adoption hearing. Burden on Court to ensure
 TITLE: In Re Adoption of R.Y., 2020-Ohio-837
 COURT: Court of Appeals of Ohio, Sixth District
 COUNTY: Erie
 DATE: March 6, 2020

In 2016, Appellants were awarded custody of R.Y. born October 2011. On March 29, 2018, Appellants filed a petition for adoption indicating mother's consent was not required because she was deceased and father's consent was required. A pre-printed notarized consent form was filed the same day on behalf of Father. Father attended the September 10, 2018 hearing but was never questioned. The adoption was granted and on November 19, 2018, Father filed a motion to contest the adoption. Father stated that he was under extreme duress over the death of the child's mother when he signed the consent form and that he believed he would be questioned and given a chance to weigh the decision at the September hearing.

The trial court vacated the adoption order finding that the consent had been accepted in error thus the proceedings finalizing the adoption were void or voidable. The trial court set a status review for December 17, 2018 and indicated that the case would be dismissed unless further action was taken within seven days. On January 2, 2019, the court ordered the minor's name and birth certificate be changed back to the way it was prior to the adoption. On July 18, 2019, Appellants filed a motion to reopen the case and permission to file a Civ.R. 60(B) motion for relief from judgment. Appellants asserted that they should be permitted to amend the petition to state that consent was not necessary due to lack of maintenance and support. On July 31, 2019, the trial court denied the motion. This appeal followed.

The appellate court held that if Father's consent was not properly obtained, the adoption was void and the trial court had inherent authority to vacate the judgment. The appellate court further found no abuse of discretion in the trial court's denial of Civ.R. 60(B) motion, finding that

Appellants had the opportunity to amend their petition in the seven days allotted for prior to the final order and dismissal.

TOPIC: Removal of bio parent from the court room after consent hearing deprived him of his opportunity to be heard on the matter of the child's best interest
 TITLE: In The Matter of the Adoption of T.C.W., 2020-Ohio-1484
 COURT: Court of Appeals of Ohio, Fourth District
 COUNTY: Meigs
 DATE: April 10, 2020

S.E. appeals the trial court's judgment that entered an adoption decree determining that his consent to the adoption of his child was not required. At the hearing, it was determined that the only contact S.E. had with the child over a three year period was mailing him two Christmas gifts. S.E. could have walked to the child's residence and banged on the door. The trial court found that S.E. failed to have de minimis contact with the child and that it was without justifiable cause. After making this finding the trial court removed S.E. from the hearing and continued with the hearing considering whether adoption was in the child's best interest.

The appeals court found that the probate court committed plain error by depriving S.E. of his opportunity to be heard regarding whether adoption was in the child's best interest. Even though the trial court found consent to adoption was not required, he retained an interest in being heard on whether adoption was in the best interest of the child. The appeals court affirmed that consent was not required but remanded the matter to allow S.E. an opportunity to be heard on the matter of the child's best interest.

TOPIC: Service of a copy of the adoption petition not required, service of notice of a hearing is sufficient
 TITLE: State ex rel. Byard v. Park, 2020-Ohio-3062
 COURT: Court of Appeals of Ohio, Fifth District
 COUNTY: Stark
 DATE: May 21, 2020

Appellant, Ms. Byard, contends the probate court lacks personal jurisdiction over her because she has not been properly served with summons and complaint pursuant to civil rules. The appeals court determined that Ms. Byard was properly served when she received the notice of hearing on petition for adoption. She was not entitled to a copy of the Petition for Adoption. Ms. Byard further contends she was unjustly denied access to the adoption file. Under R.C. 3107.17(B)(1), Ms. Byard is not entitled to review the probate court's adoption file without consent of the court.

JURISDICTION

TOPIC: Juvenile Court has discretion to defer Parents' visitation motion entirely, until the resolution of the Adoption Case in Probate Court.
 TITLE: B.N.S., 2020-Ohio-4413
 COURT: Court of Appeals of Ohio, Twelfth District
 COUNTY: Butler
 DATE: September 14, 2020

In September 2014, Grandfather filed for the temporary custody of B.S., K.S., and H.L. in the Juvenile Court. Grandfather sought the temporary custody of the children "until [Mother] gets back on her feet." Parents consented to the change in custody of B.S. and K.S., and H.L. In June 2019, Grandfather initiated adoption proceedings for the children by filing petitions of adoption in the Probate Court. Grandfather claimed the consent of neither Parents was required due to their lack of contact with the children over the preceding year.

In September 2019, Parents moved the Juvenile Court to modify their visitation and parenting time. Parents requested the Juvenile Court to order an alternate parenting schedule with the children that is in the children's best interests, and not solely controlled by Grandfather. In December 2019, Grandfather moved the Juvenile Court to stay any further hearings regarding parenting issues and to relinquish its jurisdiction to the Probate Court. The magistrate issued an order granting Grandfather's motion to stay and to relinquish jurisdiction. The Parents appealed.

The appellant court found the Juvenile Court was not precluded from proceeding in the Visitation Case or from considering Parents' motion. However, the Juvenile Court was not required to continue the Juvenile Court proceedings after learning of the Adoption Case and was within the court's discretion to defer consideration of Parents' motion, and to stay the Visitation Case entirely, until the resolution of the Adoption Case.

TOPIC: No consent for adoption required if Father never established paternity before petition for adoption is filed.
 TITLE: In Re L.M.S., 2020-Ohio-2812
 COURT: Court of Appeals of Ohio, Fifth District
 COUNTY: Delaware
 DATE: May 5, 2020

Father was not married to Mother at the time of conception or birth of L.M.S, does not appear on the birth certificate of L.M.S, did not register his name with the Ohio Putative Father Registry on behalf of L.M.S, no court or administrative action established paternity of L.M.S. before the Petitioners filed their petition for adoption, and no acknowledgment of paternity had been signed prior to the petition for adoption was filed. Father therefore cannot be legally recognized as father or putative father under Ohio adoption law and his consent to adoption is not required. Appeals court found no abuse of discretion in the trial court's finding.

ESTATES

TOPIC: R.C. 2106.22 provides a surviving spouse an opportunity to set aside a separation agreement with a four month statute of limitations.
 TITLE: Matter of Estate of Lodwick, 2019-Ohio-4559
 COURT: Court of Appeals of Ohio, Fourth District
 COUNTY: Lawrence
 DATE: October 30, 2019

On March 10, 2016 Michael and Lisa Lodwick entered into a marital separation agreement wherein they agreed not to take against each other's will regardless of whether a divorce was granted. Lisa Lodwick died March 28, 2018 and at that time the court had not issued an entry regarding the separation agreement. Ashlee Stapleton was appointed executor of Lisa's estate. In August 2018, Michael filed a notice to take against Lisa's will. In December Ashlee filed a motion for authority to enforce the terms of the separation agreement. At February 2019 hearing, the court granted Ashlee's motion based on R.C. 2106.22 which requires a surviving spouse to file a motion to set aside the separation agreement within 4 months of the appointment of an executor, otherwise the separation agreement is presumed valid.

Michael appealed; The decision was affirmed.

TOPIC: The law favors immediate vesting of interests in a will unless clearly indicating an intention to vest at a later date.
 TITLE: Estate of Gaskill, 2019-Ohio-4936
 COURT: Court of Appeals of Ohio, Third District
 COUNTY: Allen
 DATE: December 2, 2019

Frank B. Gaskill died testate on May 27, 2017. His will left all his property to his step-children Sharon Johnson, Rita Williams, and Harry C. Crisp. Crisp was appointed executor on November 13, 2017. Gaskill's will had a provision that "If any one of the aforementioned predeceases the others, his or her share shall be divided equally by the other two." Williams, Johnson and Crisp all survived Gaskill, but Johnson died before the estate was distributed. In August 2018, Williams and Crisp requested a construction of the will arguing the testator intended Johnson's share be divided among the other two regardless of her surviving the testator. The trial court found that the three beneficiaries' interests vested at the time of the testator's death and Johnson's subsequent death did not extinguish the bequest made to her.

Williams and Crisp appealed arguing that the survivorship language expressed Gaskill's intention to limit the devise to his step-children and intended that they take title to the property as joint tenants with rights of survivorship. The appeals court affirmed the trial court's decision and held that there would need to be a clear expression from the testator to show that he intended to postpone the vesting of interests to a later time, otherwise Ohio strongly favors the immediate vesting of estates. The appeals court further found that the will did not articulate an intention to take title to any property as joint tenants with rights of survivorship.

TOPIC: A party challenging an inventory of an estate has the burden of proof to support their challenges.
 TITLE: Matter of Wright, 2019-Ohio-3480
 COURT: Court of Appeals of Ohio, Fourth District
 COUNTY: Gallia
 DATE: July 16, 2019

David Wright appealed an order approving the final inventory of his father Clyde Wright's estate. David's sister, Rhonda Lynn Sluder, was removed as administrator and the court appointed a special administrator. The siblings disputed an amended inventory list. Rhonda claimed her brother had taken items prior to their father's death, while Wright disputed this claim and each side had one witness that corroborated their claims. The trial court issued a judgment that only the items on the inventory owned by Clyde Wright at the time of his death would be included in his estate. The trial court found no evidence that Clyde Wright had died owning several of the disputed items.

Wright appealed arguing the trial court erred in holding that Rhonda bore some burden of proof that the items were in fact assets of the estate. Wright argued that Rhonda prepared the list of assets and he did not bear any of the burden in proving the list was accurate.

Under R.C. 2115.16, a probate court may hold a hearing on an inventory including witnesses, and journalize its findings. Here both Wright and Rhonda participated in the hearing. The Appeals court affirmed and stated, "The law is well settled that the exceptor, as the party challenging the inventory, has the burden of going forward with evidence challenging the estate's inventory."

TOPIC: A summary judgment deciding some assets in dispute are probate assets but not making a determination of all assets at issue is not a final appealable order.
 TITLE: Newman v. Jones, 2020-Ohio-374
 COURT: Court of Appeals of Ohio, Fourth District
 COUNTY: Ross
 DATE: February 3, 2020

The parties were seeking a determination by the probate court as to whether certain items were probate assets. The probate court entered summary judgment on some of the assets but not all. The judgment entry states it is a "final appealable order." Following an appeal of the summary judgment, the appeals court determined the judgment is not a final appealable order because it does not dispose of the whole case or a separate and distinct branch thereof. Further, the order does not affect a substantial right belonging to the Appellants because appropriate relief can be afforded to them once the trial court makes a full determination as to what assets belong to the estate.

TOPIC: Spouse must have knowledge of a right to allowance before it can be waived, and the waiver must clearly appear.
 TITLE: Estate of Kuzman, 2019-Ohio-4135
 COURT: Court of Appeals of Ohio, Eleventh District
 COUNTY: Trumbull
 DATE: October 7, 2019

John Kuzman Sr. died intestate in August 2010. He was survived by Helen Kuzman his wife with whom he had no children, and two adult children of his own. In 2010, Helen opened a tax only estate to file John Sr.'s tax return. She proceeded to cash John Sr.'s dividend checks for 7 years until her death in 2017. John Kuzman Jr. then began to administer his father's estate. Helen's executor Michael Kollar applied for the family allowance. John Jr. objected to the application and argued that Helen had waived her right to the allowance because she had tried to defraud him and his sister by cashing the dividend checks and concealing the stock shares. The magistrate agreed and found that Helen had waived her right through her conduct. The probate court agreed and adopted the decision.

The appeals court determined the trial court used the wrong legal standard. One must have knowledge of a right before it can be waived, and the waiver must clearly appear. The Court found no evidence that Helen knew she was entitled to the spousal allowance or that she intended to waive it, therefore the decision was reversed and remanded.

TOPIC: If not an "interested person" under R.C. 2107.71 (A), a party lacks standing to challenge a will even if in prior will
 TITLE: Cook v. Everhart, 2019-Ohio-3044
 COURT: Court of Appeals of Ohio, Eight District
 COUNTY: Cuyahoga County
 DATE: July 25, 2019

John Cook's claim against the validity of Roosevelt Striggle's last will was dismissed after Maxine Everhart the executor of estate proved the validity of an interim will executed June 30, 2014 that left no interest to Cook. Because Cook's interest was in a 2006 will, he lacked standing to challenge the December 13, 2014 (last) will when the June 30, 2014 interim will was found to be valid since he was no longer an "interested person" under R.C. 2107.71 (A). As a friend and not a blood relative, Cook would not have a statutory interest, and therefore must prove that he would have an interest from a prior will if the challenged will were invalid. Because of the interim will, he cannot make that showing. The appellate court upheld the finding that Cook was not an "interested person" and lacked standing to challenge the will.

TOPIC: "Mansion Home" does not require surviving spouse to reside in the home.
 TITLE: Chambers v. Bockman, 2019-Ohio-3538
 COURT: Court of Appeals of Ohio, Twelfth District
 COUNTY: Clermont
 DATE: September 3, 2019

Joseph Feltner died testate on June 27, 2017. He left his rental property to his surviving wife Rebecca Chambers and the remainder of his estate to executor David Bockman. Chambers filed complaint to purchase the mansion house and adjacent farm for the appraised value of \$378,000. Bockman argued that the home did not qualify as mansion home because Chambers had never lived there, and that the will specifically devised the property to him, and the farm was not part of the property under that statute. The probate court found that it is not necessary for the surviving spouse to live in the decedent's home for it to be considered a "mansion house," that the will was a general devise of property to Bockman, not specific, and Chambers was entitled to purchase the farm along with the home under R.C.2106.16.

The appellate court upheld the decision finding that the statute did not define "mansion house" and "does not limit its application to one who was a resident at the time of decedent's death, and is in fact devoid of any language placing a residency requirement on the surviving spouse before he or she can enjoy the benefit of the statute."

TOPIC: Sales to close relative of executor are not void, but may be voidable at the election of the heirs.
 TITLE: Verhoff v. Verhoff, 2019-Ohio-3836
 COURT: Court of Appeals of Ohio, Third District
 COUNTY: Allen
 DATE: September 23, 2019

Martha Verhoff died testate in 2006 naming son David executor of her estate. She was survived by five children. The siblings agreed that David and his brother Phillip would purchase the family farm. David's attorney advised him that he could not purchase estate assets as executor. The brothers entered into an oral contract where they would each pay half the farm's purchase price (proceeds split between the five siblings) and the farm would be deeded to Phillip with the understanding that Phillip would deed a one half interest to David at a later date.

The two ran the farm together for about eight years until David asked for the deed to his one half interest at which time Phillip asserted that the amount paid by David had been a loan and the farm was solely his. The value of the farm had appreciated significantly. The found there had been a valid oral contract and awarded David half the rental income and half the value of the farm.

Phillip argued on appeal that the side contract between the brothers was void under R.C. 2109.44. The appellate court found that R.C. 2109.44 applied to the sale contract of Phillip and the estate, not the side agreement between the two brothers, which Phillip had not questioned. In any case the statute would not make the sale void, but could be voidable if the heirs had elected to challenge. Phillip further argued that the oral contract was void under R.C. 1335.05 statute of frauds, but the

court found the exception for partial performance applied because of the payment made by David and the shared income and expenses of the farm.

CLAIMS AGAINST AN ESTATES

TOPIC: Limitations period for enforcement of creditor claims against an estate does not apply to mechanic's lien.
 TITLE: U.S. Bank National Association v. Swartz, 2019-Ohio-2021
 COURT: Court of Appeals of Ohio, Tenth District
 COUNTY: Franklin
 DATE: May 23, 2019

Kathleen Swartz died intestate on April 6, 2016. On or about October 29, 2016, Connie D'Andrea entered into a contract with Kathleen's son and heir Donald Swartz to repair and eventually buy Kathleen's condominium. Donald then dies unexpectedly on March 30, 2017. His surviving spouse Helen Swartz became administrator of Kathleen's estate. As part of a foreclosure action on the condo, the lender notified D'Andrea who filed a mechanic's lien against the property for the \$25,404.47 in expenses incurred for materials and improvements.

Helen denied D'Andrea's interest and moved for summary judgment against it. The trial court granted summary judgment finding that R.C. 2117.06 barred the mechanic's lien claim because it had not been asserted within six months of Kathleen's death.

The appeals court overturned finding that Kathleen's death did not trigger a limitation period for a mechanic's lien based on agreements with subsequent owners. The court further found that a mechanic's lien follows the property in rem, and does not require a judgment in personam. The Appeals court overturned the summary judgment decision and remanded to the trial court to decide the validity of the lien.

TOPIC: Applicability of R.C. 2117.06 (A)(2) when a creditor claims to have sent notice to a distributee.
 TITLE: In re Lacey, 2019-Ohio-3384
 COURT: Court of Appeals of Ohio, Tenth District
 COUNTY: Franklin
 DATE: August 22, 2019

Barbara Lacey died at Friendship Village on August 7, 2017. In her will she gave jewelry to one beneficiary and left the rest of her estate to her named executor Ms. Paternoster. Roughly two weeks later Friendship Village sent a letter to Ms. Paternoster asking for the past due amount on Lacey's account. On September 6, 2017, Ms. Paternoster filed applications to probate Lacey's will and an application to relieve the estate from administration. Ms. Paternoster's filing and supplemental filing claimed \$12,000 in assets and no debts.

Friendship Village continued to send bills to Ms. Paternoster and advised her in a letter from its attorney that she had failed to reference a real estate property of Lacey's valued at \$36,500 and advised that this property should be liquidated and money used to pay Friendship Village's claim.

On February 23, 2018, Friendship Village filed a Civ.R. 60 (B) motion asking the probate court to vacate the entries relieving the estate from administration. The magistrate denied the motion reasoning that the motion was filed six months after the death of Ms. Lacey and was barred by R.C.2117.06. Friendship Village objected arguing that under R.C. 2117.06 (A)(2) it had properly submitted its claim in writing to “those distributees of the decedent’s estate who may share liability for the payment of the claim.”

The probate court adopted the magistrate’s decision without addressing Friendship Village’s argument about the subsection of the statute. The appellate court reversed the decision and remanded back to the probate court to evaluate Friendship Village’s argument concerning R.C. 2117.06 (A)(2).

TOPIC: A claim satisfies the presentment requirement of R.C. 2117.06 when it is presented to the executor’s attorney.
 TITLE: Hatfield v. Heggie, 2020-Ohio-1156
 COURT: Court of Appeals of Ohio, Sixth District
 COUNTY: Ottawa
 DATE : March 27, 2020

Appellant paid the funeral bill for Amy Heggie and submitted a claim to the Estate. Appellee acknowledged that a written claim was submitted to the attorney for the estate, that appellee reviewed the claim, and that appellee rejected the claim, in part because appellant already had money that belonged to the estate. Appellant filed the instant Complaint against Appellee, individually. The trial court ruled that there was insufficient evidence to determine that the claim was properly presented as required under R.C. 2117.06.

The appeals court reversed stating that the trial court clearly lost its way to the extent that it determined that appellant had not satisfied the presentment requirement under R.C. 2117.06. Based on the testimony of Appellant and Appellee the written claim was submitted to the attorney for the estate. The appeals court ruled a claim satisfies the presentment requirements of R.C. 2117.06 when it is presented to the executor’s attorney. The appeals court remanded to determine whether Appellant already received compensation from the estate.

TOPIC: Defendant who dies during litigation and the representative of his estate are not "different" parties for purposes of the savings statute.
 TITLE: Warner v. Marshall, 2020-Ohio-1185
 COURT: Court of Appeals of Ohio, Twelfth District
 COUNTY: Fayette
 DATE: March 30, 2020

In 2015, James Valentine negligently operated his motor vehicle, causing a collision between his motor vehicle and the motor vehicle of Warner. Warner timely filed a personal injury lawsuit naming Valentine as the sole defendant. After the suit commenced, Valentine passed away. Warner voluntarily dismissed his complaint, without prejudice. Marshall was appointed to act as special administrator of Valentine's estate. The next day, Warner refiled the personal injury complaint against Marshall in his capacity as administrator of Valentine's estate.

Marshall subsequently moved to dismiss the complaint pursuant to Civ.R. 12(B)(6) arguing that Warner had filed his personal injury claim beyond the two year statute of limitations, as the accident occurred in May 2015 and the complaint was refiled in December 2018. Marshall argued that the savings statute (R.C. 2311.21) did not apply because the first complaint was filed against Valentine and the refiled complaint was filed against a different party, i.e., Valentine's estate.

The trails court issued its decision granting Marshall's motion to dismiss ruling that the savings statute did not apply because the parties are not substantially the same. The appeals court reversed holding that a defendant who dies during the pendency of litigation and the representative of his estate are not "different" parties for purposes of the savings statute.

TOPIC: Interest in a refund paid after Medicaid recipient's death is part of the non-probate estate and can be recovered by the Ohio Department of Medicaid
 TITLE: Ohio Dept. of Medicaid v. French, 2020-Ohio-2744
 COURT: Court of Appeals of Ohio, Second District
 COUNTY: Darke
 DATE: May 1, 2020

Husband and wife entered into an agreement with a retirement community and made an original deposit of \$108,400. Wife predeceased husband. After Husband's death, the value of his estate included \$48,780 attributable to a refund paid by the retirement community from the couple's original deposit. Pursuant to the definition of "estate" in R.C. 5162.21(A)(1)(b) (non-probate assets), as well as the definition of "time of death" in R.C. 5162.21(A)(5), Wife's ownership interest in her half of the refund was not extinguished by her death and endured post-mortem.

The trial court ruled the refund was a quantifiable non-probate asset which the Ohio Department of Medicaid (ODM) was entitled to recover from Husband's estate pursuant to a properly filed estate recovery claim for Medicaid medical assistance benefits previously paid on behalf of wife. The appeals court affirmed stating that ODM was entitled to the refund since it was part of the wife estate even though she predeceased her husband.

ATTORNEY FEES

TOPIC: Attorney's fees incurred from refiling application to distribute assets cannot be categorically denied.
 TITLE: Matter of Estate of Weiner, 2019-Ohio-2354
 COURT: Court of Appeals of Ohio, Second District
 COUNTY: Montgomery
 DATE: June 14, 2019

Joey Weiner died on May 27, 1998, leaving her three sons Dan Weiner, Harry Weiner and Ted Weiner as her beneficiaries and nominating Ted as executor in her will. After nearly twenty years of litigation associated with the estate including a wrongful death suit later abandoned and six accountings with subsequent exceptions followed by hearings and objections, the probate court

entered a final decision on August 30, 2016. Dan and Harry filed appeals shortly after in September 2016, and oral arguments were heard in the Appeals court on March 12, 2019.

On the estate's cross-claim the appeals court found that the probate court erred in summarily denying the estate pay attorney's fees for any services after June 22, 2005 without reviewing the nature of the services provided or the circumstances. By assuming the services were not related to the administration of the estate, the appeals court found that the probate court "unfairly absolved Dan and Harry of their responsibility for the protracted, redundant litigation over attorney's fees and discovery." On remand the probate court must evaluate the services rendered and indicate the reason why each is authorized or not authorized.

The Appeals court found that the probate court did not abuse its discretion by allowing the estate to pay attorney's fees in relation to the wrongful death suit. The court found that Ted had the "option to involve the estate at Dan's request inasmuch as the 'litigation involv[ed] principally the interests of [Joey Weiner's] will.'" The court also found no abuse of discretion in the probate court's authorization of payment for services relating to the proposed release of Ted Weiner, because defense of a decedent's choice of executor is beneficial to the decedent's estate.

TOPIC: No abuse of discretion to grant higher fees in a probate case where it is merited due to poor relationship between the beneficiaries.
 TITLE: Matter of Estate of Schwenker, 2019-Ohio-2581
 COURT: Court of Appeals of Ohio, Tenth District
 COUNTY: Franklin
 DATE: June 27, 2019

The probate court did not abuse its discretion in finding that higher attorney's fee were merited due to a contentious relationship between the co-executors causing difficulty and lack of cooperation when performing their fiduciary duties.

TOPIC: Extraordinary attorney fees may be denied when the estate is small and the services benefitting the estate are appropriately considered.
 TITLE: Estate of Brunger, 2019-Ohio-3548
 COURT: Court of Appeals of Ohio, Eleventh District
 COUNTY: Portage
 DATE: September 3, 2019

The appellate court upheld the decision of the probate court to deny extraordinary attorney fees based on the small size of the estate and time and labor spent on services that actually benefitted the estate. "In considering all the factors relevant to the estate and the services performed for its benefit, supported by the record, the probate court properly exercised its discretion in granting appellant the minimum reasonable amount of attorney fees for a full administration, albeit less than appellant had requested."

TOPIC: Sufficient to evaluate each service individually and determine if it was reasonable.
 No requirement for a second hearing on attorney fees.
 TITLE: In Re Estate of Weiner, 2020-Ohio-1527
 COURT: Court of Appeals of Ohio, Second District
 COUNTY: Montgomery
 DATE: April 17, 2020

Joey Weiner died in 1998, leaving her three sons Dan Weiner, Harry Weiner, and Ted Weiner as her beneficiaries and nominating Ted as executor in her will. After nearly twenty years of litigation, the probate court entered a final decision in 2016.

This case concerns Ted's application to pay attorney fees incurred after 2005. Previously, the probate court denied all attorney fees after 2005 calling them "fees on fees." The appeals court reversed and remanded holding that the court could not summarily deny all fees and must evaluate all services individually. On remand, without a hearing, the probate court authorized the estate to pay about a third of the requested attorney fees. The brothers appeal claiming the court failed to comply with remand instructions and challenging the court's decision not to hold a hearing.

The appeals court found the probate court complied with their instructions because it evaluated each service individually and determined if they were reasonable. The appeals court also found that a new hearing was within the discretion of the probate court since the probate court already held a hearing and there are no assertions that new information or evidence should be considered.

TOPIC: One third contingency fee is standard in settlement case and not against manifest weight of evidence.
 TITLE: Estate of Green v. Alter, 2019-Ohio-2862
 COURT: Court of Appeals of Ohio, Fifth District
 COUNTY: Licking
 DATE : July 11, 2019

Alexis Green hired attorneys Mitchel Alter and Mark Froelich to represent her in an estate settlement and wrongful death claim for her husband killed in a car accident caused by his friend. Green had signed a contingency fee agreement for one-third of the total settlement recovered plus fees. After the attorneys settled for policy limits of 2.5 million, Green contested the one-third contingency as excessive. The trial court found the fees were not excessive and approved the attorney's fees. Green appealed, and the appellate court upheld the decision finding that the probate court had done an extensive analysis into the one-third contingency fee. The trial court found that the case had several complicated components, the fee assignment was standard, and there was no evidence of any attempt to take advantage of Green.

CONCEALMENT

TOPIC: Hearsay exceptions and burden of proof in concealment action.
 TITLE: Estate of DeChellis v. DeChellis, 2019-Ohio-3078
 COURT: Court of Appeals of Ohio, Fifth District
 COUNTY: Stark
 DATE: July 29, 2019

The appellate court upheld the decision of the trial court which found cohabitant and child of the decedent guilty of having concealed, embezzled, conveyed away, or having been in possession of \$750,000 in cash that belonged to the estate.

Four assignments of error were overruled by the Court. First, Appellants contended that the trial court had used the wrong evidentiary standard, arguing that the trial court used indirect evidence when it should have used direct evidence as the burden of proof. The appeals court found that the trial court used the correct burden of proof and that was a preponderance of the evidence showed Appellants had concealed or withheld the money from the estate.

Second, Appellants argued that the trial court had erred by admitting hearsay evidence over objection. The Court pointed out that the appellant must indicate from the record where the alleged errors occurred which they failed to do. In its assumption that the appellants were pointing to instances where the executor relayed statements from the decedent, the Court found a permissible exception under Evid. R. 804 (B) because the executor was the estate representative and therefore the decedent's representative allowing him to "speak from the grave."

Third, Appellants argued that the trial court erred in allowing counsel to cross-examine them using discovery depositions. The Court found that Appellants had waived the right to this claim because they had not objected to its use at trial. Further, Appellants had themselves used discovery depositions during cross-examination, so under the theory of "invited error" "a party will not be permitted to take advantage of an error which he himself invited or induced the trial court to make."

Fourth, Appellants argued that the trial court's judgment was against the manifest weight of evidence. The Court found that the case had turned on the credibility of witnesses which is within the trial court's discretion. The Court pointed out that in a civil case, the trial court is allowed to derive inferences from Appellants' invocation of the Fifth Amendment privilege when questioned about the missing \$750,000.

TOPIC: A concealment action cannot be brought for assets that never belonged to an estate.
 TITLE: Vari v. Coppola, 2019-Ohio-3475
 COURT: Court of Appeals of Ohio, Seventh District
 COUNTY: Mahoning
 DATE: August 26, 2019

Jodi Coppola died from cancer in 2012 and left her companion Louis Vari as executor of her estate. Shortly before her death a spaghetti dinner fundraiser was held to generate funds to help with her

illness. Jodi deposited \$25,000 in cash from the fundraiser into a safety deposit box at a local bank and added her mother Carol Coppola's name to the safety deposit box. Jodi instructed Carol that she did not want Louis to have access to the funds and instructed her mother to use the money solely for the benefit of Jodi's four surviving children. Carol used some of the money for clothes, gifts and a trip to Disney for the kids.

Louis brought a concealment action against Carol in 2018. After a bench trial, the probate court found that Carol was not guilty of concealing assets under 2109.50 because the cash did not belong to the decedent at the time of her death. The probate court further ordered the remaining \$6,000 in cash be placed in a constructive trust for the benefit of the four children.

Louis appealed the decision, but the appellate court upheld agreeing that the cash did not belong to the decedent and therefore a concealment action cannot be brought to recover what never belonged to an estate. The appellate court further stated that Louis had not met his burden of demonstrating error under App.R. 16(A)(7) with his six sentence argument that conceded the trust was appropriate and only argued that an accounting was necessary, but had never brought an action for accounting.

TOPIC: Under Evid. R. 803(3), a decedent's statements regarding a party's future inheritance are admissible.
 TITLE: Pirock v. Crain, 2020-Ohio-869
 COURT: Court of Appeals of Ohio, Eleventh District
 COUNTY: Trumbull
 DATE: March 9, 2020

Ralph Crain passed away in June 2014, predeceased by his wife Margaret Crain in June 2013. This case stems from a line of litigation amongst their six surviving children, four of them being the Plaintiffs and their brothers Frederick and Bryan. This case involves a concealment action brought by the Plaintiffs alleging Frederick and Bryan concealed assets of their father's estate; specifically six strongboxes holding \$130,000 in cash and six white canvas bags containing \$366 each in coins. These items are alleged by the Plaintiffs to have been designated by their mother and father to be distributed to each of the siblings upon their death.

Prior to this action, the siblings were involved in proceedings regarding their mother's estate in July 2014 regarding the same assets. In September 2015 exceptions to Margaret's were dismissed by the probate court. A jury trial in 2014 commenced over a contested will action to an August 2013 will executed by Ralph. The jury found in favor of Plaintiffs after emotional testimony purporting Frederick and Bryan's undue influence and the will was subsequently invalidated as a result. In February 2016, Plaintiffs' exceptions to Ralph's will were dismissed and the appellate court upheld the decision.

In November 2018, Plaintiffs filed this complaint of concealment of assets with a jury demand. The trial court granted Frederick's motion in limine and motion to dismiss finding that plaintiff's prior testimony regarding Ralph's statements were inadmissible hearsay and the plaintiffs had failed to establish the concealment action with evidence that the missing assets were titled in Ralph's name at the time of his death and that Frederick or Bryan were in possession of the assets.

The appellate court found the trial court has abused its discretion in finding the plaintiff's prior testimony to be inadmissible hearsay. The trial court was correct that the 804(B)(5) exception did not apply, but the appellate court found that under Evid. R. 803(3), the decedent's statements regarding a party's future inheritance are admissible. The appellate court found that the trial court also abused its discretion in granting the motion in limine because it was based on the sufficiency of the plaintiff's evidence rather than its relevance.

The appellate court further found that Frederick had not met his burden regarding some of the assets, and there was genuine issue of material fact regarding the existence of Ralph's cash and Ralph's ownership of it at his death. Therefore summary judgment was improper.

TOPIC: Debts owed to a decedent at time of death are assets of an estate and the probate court has jurisdiction to claims of their concealment.
 TITLE: Matter of Estate of Bolog, 2019-Ohio-4083
 COURT: Court of Appeals of Ohio, Seventh District
 COUNTY: Mahoning
 DATE: September 30, 2019

In 2015, Frank Bolog was appointed executor of his father's estate based on a will executed in 2013. His sister Patricia Schaefer filed a will contest action and moved to remove Frank as executor. They agreed to the appointment of Anne Piero Silagy as administrator for the estate. In 2017, a jury invalidated the will because it had been executed at Frank's urging and during a time when his father was suffering from dementia. In 2017, Patricia filed a complaint that Frank had concealed, embezzled, or was in possession of monies belonging to the estate, and that some real estate transfers were executed under undue influence. Frank had made loans to companies on his father's behalf and had not returned the promissory notes or the funds to the estate.

In 2018, Frank filed a motion for judgment on the pleadings asserting that the probate court did not have subject matter jurisdiction because the complaint was a collection of debt and the real estate claims were barred by the statute of limitations. The probate court denied the motion for judgment on the pleadings and after a trial the jury found Frank guilty of concealing three promissory notes owed to the estate, and adjudged that he owed \$464,661.24 to the estate.

Frank appealed the denial of his motion for judgment on the pleadings asserting the probate court lacked jurisdiction asserting the action was an attempt to collect a debt, and that the statute of limitations had run on the undue influence claims concerning the real estate transfers. The appeals court found that because the money in the promissory notes was owed to Bolog on the date of his death, the debt constituted assets of the estate that were in Frank's possession, and therefore the probate court had proper jurisdiction. The Court also found that the undue influence claim had been dropped at trial and the statute of limitations assignment of error was moot.

TRANSFERS ON DEATH

TOPIC: Power of Attorney must expressly allow changing of beneficiaries on accounts for the change to be valid.
 TITLE: Hillier v. Fifth Third Bank, 2020-Ohio-3679
 COURT: Court of Appeals of Ohio, Second District
 COUNTY: Miami
 DATE: July 10, 2020

Decedent nominated James, his grandson, as his attorney-in-fact. Decedent and James went to Bank and signed documents indicating no POD beneficiaries on his accounts. They then went to an attorney where Decedent executed a will that granted all his personal and real property to his grandchildren. Later, before Decedent's death, James went back to the bank and mistakenly signed documents that listed himself and Judith Brown, Decedent's daughter, as POD beneficiaries of Decedent's accounts.

Upon Decedent's death, the Bank released the accounts to the beneficiaries (James and Judith). James as executor of Decedent's estate brought an action against the Bank and Judith. The Trial court entered summary judgment against James and the appeals court reversed.

The appeals court found that Ohio law requires a power of attorney to expressly allow the changing of beneficiaries on accounts. Since the POA, in this case, did not expressly grant this power, James's signature on the documents was invalid and did not create any POD beneficiaries. Since the Bank incorrectly released the funds to the beneficiaries the appeals court rendered summary judgment against the Bank on breach of contract and conversion claims and against Judith on an unjust enrichment claim.

TOPIC: Pursuant to R.C. 2111.04 (D), a transfer on death affidavit signed after notice of application for guardianship and before the hearing is not valid and void as a matter of law.
 TITLE: Estate of Gravis v. Coffee, 2019-Ohio-2806
 COURT: Court of Appeals of Ohio, Ninth District
 COUNTY: Summit
 DATE: July 10, 2019

Notice of application of Guardianship for the person and estate of Mr. Gravis was received on June 8, 2015. A guardian of person was appointed on August 20, 2015. Mr. Gravis signed a transfer of death designation for his Bath property to Michael and Thomas Coffee on November 23, 2015. The hearing for the guardianship of the estate was held on November 25, 2015, and the trial court appointed a guardian. The Coffees disputed the ownership of the Bath property and sought to have the transfer on death affidavit declared valid.

The trial court declared the affidavit invalid and void as a matter of law pursuant to R.C. 2111.04 (D) which provides "From the service of notice [of the guardianship proceeding] until the hearing, no sale, gift, or encumbrance of the property of the alleged incompetent shall be valid as to persons

having notice of the proceeding.” The appellate court upheld the decision, and found that the Coffees had failed to show any error of the trial court.

TOPIC: Testamentary capacity and undue influence judgments will be upheld unless against the manifest weight of evidence.
 TITLE: Stanek v. Stanek, 2019-Ohio-2841
 COURT: Court of Appeals of Ohio, Second District
 COUNTY: Greene
 DATE: July 12, 2019

Three siblings appealed a judgment upholding the transfer on death and will of their father that left everything to the youngest sibling Ed. Appellants argued that the trial court erred in its finding of testamentary capacity of their father and that the judgment was against the weight of the evidence. Mr. Stanek’s own doctors testified at trial that he was competent at the time of the transfer and described his illnesses as not debilitating. The trial court did not find the loss of hearing and vision equal to a lack of testamentary capacity. In addition the lawyer and secretary who handled Mr. Stanek’s execution of the documents testified that they would not have allowed him to execute the will if there was a question of his competency.

The appellate court found the trial court’s judgment was not against the manifest weight of evidence and overruled the assignments of error. The assignments of error regarding undue influence were also overruled because the circumstantial evidence did create suspicion but was insufficient to overcome other equally reasonable explanations, therefore the court did not err in finding that the appellants had not met their burden of proof.

TOPIC: Decedent’s TOD designation is valid even if under an out of state guardianship
 TITLE: Lomelino v. Lomelino, 2020-Ohio-1645
 COURT: Court of Appeals of Ohio, Second District
 COUNTY: Montgomery
 DATE: April 24, 2020

In 2015, Decedent was declared to be a disabled adult by an Illinois court. The court named Decedent’s son, David, and David’s wife, Christine, as the Guardians. Decedent then moved to Ohio and purchased a house naming Christine and his granddaughter as transfer-on-death (TOD) beneficiaries.

Later, the Illinois court replaced David and Christine as co-guardians of Decedent’s estate. The new guardian filed a document revoking all prior wills, codicils, trusts, and any other estate planning documents. Decedent died an Ohio resident and the new guardian filed in Ohio an affidavit stating that the TOD designation was revoked and void. The executor sued the TOD beneficiaries to quiet title to the Ohio home.

The Trial court ruled for the TOD beneficiaries and the appeals court affirmed. Under Ohio law, a guardianship ward is not automatically prohibited from executing a will or otherwise making testamentary dispositions. The TOD beneficiaries presented unchallenged evidence of Decedent’s testamentary capacity at the time of making the TOD designation.

TOPIC: Summary judgment improper where a deed is delivered, but not signed before the beneficiary's death
 TITLE: Catley v. Boles, 2020-Ohio-240
 COURT: Court of Appeals of Ohio, Eleventh District
 COUNTY: Geauga
 DATE: January 27, 2020

Husband and Wife created a trust to transfer their real property to their two children in equal shares. Both children were living on the property upon their parents' deaths. There was a delay in terminating the trust while the siblings decided how to partition the property. When the deed to patrician the property was finally prepared and partially executed, the daughter died.

The trust terms provided for immediate distribution, but also provided that if one of the children died before distribution their share would pass to the other unless they exercised a power of appointment.

The daughter died intestate and the estate sued for her share. The trial court on summary judgment awarded her share to her brother since her share had not been distributed and she did not exercise a power of appointment. The appellate court remanded finding questions of fact surrounding the preparation and execution of the deed. The deed was not signed by the sister, but it was prepared and delivered to her. The trial court must determine if there was a valid transfer of property.

PROCEDURE

TOPIC: Appellant barred from appealing second application to administer estate when failed to timely appeal the first.
 TITLE: In Re Claire Lee, 2020-Ohio-1601
 COURT: Court of Appeals of Ohio, Eighth District
 COUNTY: Cuyahoga
 DATE: April 23, 2020

Shampine is attempting to appeal the trial court's order withdrawing an application for authority to administer her sister's estate. Shampine first filed an application for authority to administer the estate in March which the court withdrew on June 20th. In May, Jefferey Bell filed an application to relieve the estate of administration because the value of the assets do not exceed \$35,000. The court relieved the estate from administration and distributed the assets to Bell as the sole heir.

In August 2018, Shampine filed a motion to vacate the judgment that withdrew her application alleging that Bell is not her sister's natural or adoptive son. The trial court denied that motion in September 2018. In October, Shampine filed a second application to administer the estate. After conducting a hearing, the court withdrew the second application and Shampine appealed the decision to withdraw here second application.

The appeals court review was extremely limited because Shampine solely appealed the second order withdrawing the October application to administer the estate. The orders withdrawing the applications were final and appealable since they affect the substantial rights of the party. Filing a

second application after the expiration of the time for an appeal from a final order does not restart the appellate clock. Because Shampine failed to appeal the order withdrawing the original application, she is precluded from litigating that decision. She could have raised the current issues in a direct appeal of the original order expiration of the time to appeal and cannot circumvent the deadline for appeal just by filing a second application.

TOPIC: Preliminary injunction ordering attorney-in-fact to preserve decedent's assets in her possession is not a final appealable order.
 TITLE: In Re Estate of John Reinhard, 2020-Ohio-3409
 COURT: Court of Appeals of Ohio, Twelfth District
 COUNTY: Madison
 DATE: June 22, 2020

Decedent nominated Appellant as his attorney-in-fact. The months before Decedent's death approximately \$500,000 was removed from Decedent's bank account and Appellant was made the sole beneficiary of decedent's investment account. The court ordered appellant to preserve any assets under her control that once belonged to Decedent. On appeal, Appellant argued the court erred by sua sponte issuing the injunction.

The appeals court concluded the preliminary injunction did not deprive Appellant of a meaningful and effective remedy at the conclusion of the estate proceedings. The injunction was to preserve the status quo pending a ruling on the merits and is not a final appealable order.

TOPIC: A prior executor with no direct pecuniary interest in an estate lacks standing to file an exception to the final accounting.
 TITLE: In re Estate of Abraitis, 2020-Ohio-4222
 COURT: Court of Appeals of Ohio, Eighth District
 COUNTY: Cuyahoga
 DATE: August 27, 2020

In 2011, Abraitis was the executor of Vlada's estate and Brady was his attorney and represented him in connection with the administration of the estate. The probate court removed Abraitis as executor of Vlada's estate and found he committed concealment ordering him to repay over \$500,000 to the estate. The court also found that Brady and Abraitis had engaged in frivolous conduct with respect to the administration of the estate and ordered them to pay \$104,485 in attorney fees.

Abraitis died in 2017 and accordance with his will, Brady was appointed executor of his estate. Fried, as fiduciary of Vlada's estate, filed a notice of claim with Abraitis' estate for the amounts he owed Vlada's estate for conversion and attorney fees. Brady, as executor, rejected the claim.

Fried also moved to remove Brady as executor of Abraitis' estate based on her conduct in the administration of Vlada's estate and her conflicts of interest. After a hearing, the probate court granted the motion to remove Brady as executor.

The replacement executor of Abraitis' estate filed a final accounting which included the Vlada estate claim previously rejected by Brady. Brady filed an exception to the final accounting. The probate court found she lacked standing because she is not a beneficiary of the estate or a creditor of the estate. The appeals court affirmed stating because Brady has no direct pecuniary interest in the estate, even though the final accounting paid claims that appellant had rejected prior to her removal as executor.

FRIVOLOUS CONDUCT

TOPIC: Frivolous conduct that impedes an estate administration can result in sanctions including difference in legal fees with and without the frivolous conduct.
 TITLE: In re Estate of O'Toole, 2019-Ohio-4165
 COURT: Court of Appeals of Ohio, Eighth District
 COUNTY: Cuyahoga
 DATE: October 10, 2019

Marcella O'Toole died in May 2016 and was survived by her five children, Thomas O'Toole, Colleen Neiden, Mary Patricia O'Toole, Michael O'Toole and Rosemary O'Toole Hamman. Neiden applied to administer the estate and the other siblings waived their right to administer. Neiden filed an inventory in September, and Thomas and Hamman filed exceptions, asserting that Neiden was hiding assets and that the three other siblings had committed money laundering. In November Hamman moved to remove Neiden as administrator. In December, Neiden filed an amended inventory including \$258,420 in cash that had been found in decedent's home, stating that each sibling had received an equal share of the cash. The magistrate held evidentiary hearings and found that every other sibling admitted receipt of their share of cash except Thomas, despite Michael and Mary Pat's testimony that they had witnessed him receiving the cash. The magistrate found that Hamman and Thomas's claims about jewelry being removed from the home were based on hearsay.

The magistrate noted that the claims of money laundering, fraudulent transfers and concealment should have been brought in a civil action, not as part of an exception to inventory hearing, but noted that there was no credible evidence brought for the claims. The magistrate found that decedent had clear control over her financial affairs and Neiden had not failed in her duties as fiduciary in any way. Thomas and Hamman filed objections to the decision without filing a transcript. The trial court overruled the objections and adopted the magistrate's decision. Neiden attempted to administer the estate with Thomas objecting to everything Neiden filed.

In August 2018, Neiden filed for sanctions against Thomas for frivolous conduct, due to Thomas continuing to challenge the inventory after it was approved by the court, serving 12 subpoenas without service on the estate, obtaining privileged financial documents including Neiden's personal bank records. The court held a hearing in November 2018 and granted the motion for sanctions. The court penalized Thomas for the difference between the allowable attorney costs for an estate of that size which was \$12,845 and the actual attorney fees which were \$35,901.43. Thomas was ordered to pay \$23,056.43. Thomas appealed this judgment.

The appeals court found that throughout the proceedings and even at his own sanction hearing, Thomas had continued to argue the same frivolous claims without any basis in law or fact, despite countless warnings from both the magistrate and trial court. The record showed that Thomas had not timely served the estate with subpoenas and wrongly subpoenaed personal bank records of siblings. The appeals court upheld the judgment finding Thomas had not offered any evidence that the trial court had erred.

TOPIC: Filing an Application for Guardianship without an expert evaluation is not frivolous conduct.
 TITLE: In re Guardianship of Calvey, 2020-Ohio-4221
 COURT: Court of Appeals of Ohio, Eighth District
 COUNTY: Cuyahoga
 DATE: August 27, 2020

Antall filed an application to be appointed the guardian of Calvey. Antall alleged that Calvey was incompetent because of his confused mental state, but provided no medical or expert evaluation as required by Ohio Rules of Superintendence. The Court Investigator's report stated that he found "no support" for the application. Calvey moved to dismiss the case and for sanctions based on the "frivolous nature" of the application. Antall filed a dismissal of his application and Calvey's motion was denied as moot. The magistrate denied sanctions because the court has historically allowed Applications for Guardianship to be accepted for filing without an accompanying Statement of Expert Evaluation. Calvey filed no objections to the magistrate's opinion and instead appealed.

The appellate court reviewed de novo whether Rule 66(A) of the Rules of Superintendence, which Calvey contends Antall violated, permits monetary sanctions for a violation thereof. The appeals court found Rule 66 is silent on sanctions for violating it and sanctions have not been imposed before.

The appellate court reviewed under the abuse-of-discretion standard, Calvey's claim of frivolous conduct made under R.C. 2323.51 and Civ.R. 11. The court found Antall's allegation of Calvey's "confused mental state" was insufficient for a guardianship application and that it is an inherent power of the court to allow Antall to file the Application for Guardianship without an expert evaluation.

GUARDIANSHIPS

ATTORNEY FEES

TOPIC: A finding for attorney's fees cannot be arbitrary, it must be consistent with the evidence in the record.
 TITLE: In re Guardianship of Beaty, 2019-Ohio-2116
 COURT: Court of Appeals of Ohio, Eighth District
 COUNTY: Cuyahoga
 DATE: May 30, 2019

After Attorney Oviatt was appointed as guardian of Beaty, he filed applications with the probate court for attorney's fees on two separate occasions. The first application fees were reduced after the magistrate determined them to be unreasonable for a guardianship matter that was not particularly complex. The trial court upheld this finding and it was affirmed by the appellate court.

In the second application, the magistrate reduced the fees to expenses only because the fees had never been accepted by Beaty in writing, occurred after a conflict, and were in a matter not related to establishing guardianship. The trial court agreed with these findings, but allowed an increased amount of fees because "the Guardianship did receive minimal benefit from the services rendered."

The appellate court found this to be an abuse of discretion because "it is a random amount that is neither consistent with the evidence in the record nor the findings made by the trial court." The record showed that Oviatt filed the second action without telling Beaty, admitted he no longer represented her when the action was filed, went to trial on the matter without any communication from Beaty and no appearance from her at trial, and admitted that he never billed Beaty for the second action. The appellate court found that the record supported the magistrate's finding and the proper recovery was the expenses only amount.

APPOINTMENT AND REMOVAL OF GUARDIAN

TOPIC: R.C. 211.02(C) does not require a hearing when a guardian is not appointed.
 TITLE: Matter of Guardianship of Weimer, 2019-Ohio-4295
 COURT: Court of Appeals of Ohio,
 COUNTY: Montgomery
 DATE: October 18, 2019

Barbara Turner filed an application for guardian of her father Richard Weimer's person and property. Turner also filed a motion for an independent expert evaluation stating that she did not have access to her father because his wife Geraldine was isolating him. The court granted the motion. The court investigator noted that the home was cluttered, but Weimer did not have any impairments to taking care of himself or his thought process and speech. The court investigator reported some impairments to Weimer's orientation and memory and recommended an

independent expert evaluation. Weimer was opposed to the guardianship and stated that even if he needed one, he would want his wife to be his guardian.

Turner moved for an order referring Weimer to Sparks Psychological Services, and the court granted the order. Weimer then moved to dismiss the application and submitted expert evaluations from two of his physicians which reported Weimer as competent and recommended the guardianship request be denied. The magistrate concluded that the guardianship should be dismissed based on the expert reports. The probate court adopted the decision.

Turner appealed claiming that the probate court erred by dismissing her application without a hearing and without requiring Weimer to submit to the order for Sparks Psychological Services. The appeals court found that the probate court was within its discretion to accept the independent evaluations submitted by Weimer as compliance with their order and their submission made the order moot. Further the Court found that R.C.211.02(C) requires a hearing prior to the appointment of a guardian for the purpose of protecting the ward's rights, not the proposed guardian, so when a guardian is not appointed, a hearing is not necessary.

TOPIC: Appointment of applicant willing to fulfill wards wishes to live in his home over other applicants is proper.
 TITLE: In re Guardianship of Keane, 2020-Ohio-1105
 COURT: Court of Appeals of Ohio, Seventh District
 COUNTY: Carrol
 DATE: March 23, 2020

Appellants Joyce, Jane, Joan, Jim, Vicki, all filed applications for guardianship of their father, James Keane. They appeal the decision of the probate court appointing James's daughter, Josette, as the guardian of his person, and appointing Josette as co-guardian, with Joyce, of his estate. The probate court gave great weight to Josette's efforts to fulfill her father's desire to live in his own home until circumstances force him to be institutionalized.

The siblings appealed claiming the court erred in terminating all powers of attorney. They argue the probate court should have appointed Joyce as guardian of James' estate based upon her previous nomination in the financial power of attorney and appointed Jane as guardian of his person based upon the healthcare power of attorney nominating her as guardian. The appeals court recognized that the probate court is not bound by the nomination of guardianship provision in a power of attorney.

The appeals court further affirmed the appointment of Josette because she was the applicant that fulfilled the requirements of Sup.R. 66.09, with her efforts to balance James' desire to live at home with the necessity of keeping him safe and in good health. Further, the probate court appointed a co-guardian of the estate to prohibit any self-dealing.

TOPIC: Probate court has discretion to remove guardians.
 TITLE: Matter of Guardianship of A.R.R., 2019-Ohio-3066
 COURT: Court of Appeals of Ohio, Tenth District
 COUNTY: Franklin
 DATE: July 30, 2019

Mother appealed probate court's decision to remove her as guardian of her son A.R.R. who suffers from schizophrenia. The evidence showed that Mother interfered and obstructed A.R.R.'s physicians by refusing recommended treatments and lowering his medications when he complained they made him too drowsy. This neglect led to A.R.R.'s malnutrition, catatonia, and hospitalization.

Mother did not timely submit the hearing transcript with her pro se objections. She filed the transcript more than one month after the probate court had issued a judgment entry. Mother claimed that the probate court erred when it did not sua sponte review the untimely transcript. The appellate court did not consider the transcript as precluded by law, and affirmed the findings of the probate court as it was supported by the manifest weight of the evidence.

TOPIC: The standard to remove a guardian is not whether another person would make an appropriate or better guardian, but whether there is good cause to remove the guardian.
 TITLE: Matter of B.E.V., 2019-Ohio-3153
 COURT: Court of Appeals of Ohio, Eleventh District
 COUNTY: Lake
 DATE: August 5, 2019

Grandmother sought to replace her daughter as B.E.V.'s guardian. The court found no good cause to remove her as guardian. The appellate court affirmed and relayed that even if the guardian had been removed, there was no guarantee that Grandmother would be instated as the new guardian.

TOPIC: Courts not required to appoint next of kin or those with familial ties as guardians.
 TITLE: Matter of Guardianship of Cooper, 2019-Ohio-3526
 COURT: Court of Appeals of Ohio, Second District
 COUNTY: Champaign
 DATE: August, 30, 2019

The Court did not abuse its discretion when it appointed a third party neutral guardian for Cooper despite his wish for his fiancée to be his guardian. There was ample evidence of abuse, neglect, and an unstable domestic relationship between Cooper and his fiancée Stricker. Therefore, the court was within its wide discretion to appoint Massie (a third party neutral) as Cooper's guardian.

TOPIC: No abuse its discretion in ordering guardianship even though guardianship terminated after only two months.
 TITLE: In re Guardianship of Vacca, 2020-Ohio-1482
 COURT: Court of Appeals of Ohio, Fifth District
 COUNTY: Fairfield
 DATE: April 10, 2020

Ms. Reigle filed an Application for the Appointment of Guardian of Vacca based on substance abuse. A Statement of Expert Evaluation by Taraq Attumi, M.D. stated that Vacca was currently confused, with an altered mental state and was his opinion that a guardianship should be established/continued. Less than a month later, Ms. Reigle withdrew her application.

The probate court ordered that the hearing would go forward based on the Expert Evaluation. At the hearing, the magistrate found Vacca still had serious medical issues as recently as the previous week. Vacca was declared incompetent and a guardian was appointed.

The probate court held a review hearing two months later and ordered that guardianship is terminated effective that day. The court approved guardian fees of \$555.00 for services rendered over the two months. Vacca appeals arguing the probate court abused its discretion in ordering a guardianship and that as a result, all costs and fees should be refunded.

The appeals court found no error in the probate court's determination that guardianship was required, based on the Application filed with the court by Ms. Reigle and the Statement of Expert Evaluation, detailing Vacca's impairments. The appeals court found no abuse of discretion in approving guardian fees, as they are in accordance with the local rule and appear to be an accurate representation of the services performed.

TOPIC: Retaining Guardian of estate was in the Wards best interest where no financial mismanagement was found.
 TITLE: In re Guardianship of Rahbek, 2020-Ohio-3223
 COURT: Court of Appeals of Ohio, Third District
 COUNTY: Shelby
 DATE: June 8, 2020

Tallet, daughter of Rahbek, moved for the Guardian to be removed and replaced by her. The trial court substituted her as guardian of her father's person, but the Guardian continued as guardian of Ward's estate. Tallet was extremely involved in the caregiving of her father and was previously given medical power of attorney. The Guardian continued to handle Rahbek's estate and the probate court found no issues with his performance. The court also found that Tallet and the Guardian worked well together. The court concluded no credible facts that it would be a benefit to Rahbek to substitute a new guardian of his estate. The appeals court affirmed this finding.

Tallet further claimed the Guardian charged excessive guardian fees and legal fees. The Guardian's fees were constantly lower than what was statutorily permitted. The Guardian's fees had been submitted to and approved by the court. Since no previous objections to these fees were made and

the requests appear reasonable, the appeals court found the trial court did not abuse its discretion in failing to remove the Guardian based on the requested fees.

LIFE INSURANCE

TOPIC: R.C. 5815.33 does not automatically revoke ex-spouse as beneficiary if evidence of the intent of the decedent is for ex-spouse to remain beneficiary
 TITLE: Durbin v. Life Ins. Co. et al., 2018 CV 0059
 COURT: Common Pleas Court, Probate Division
 COUNTY: Summit
 DATE: September 3, 2019

Plaintiff and decedent were married and during the marriage Plaintiff was named beneficiary of Decedent's life insurance policy. They later divorced without the divorce decree addressing the insurance policy. Plaintiff kept paying the premiums on the life insurance policy and it was to date when Decedent died. The issues is whether Plaintiff, the ex-spouse should receive the benefits or, the contingent beneficiary, Decedent's mother.

R.C. 5815.33 states that a life insurance policy not mentioned in a divorce decree will automatically revoke a prior spouse's status as beneficiary. The Court determined that virtually all cases interpreting this statute refer to insurance policies paid by an employer. In those cases the decedents failed to correct employer records after divorce and there was no other evidence of intent to include the ex-spouse as a beneficiary. The Court held that Decedent's presentation of the premium statements to Plaintiff and his payment of the premiums established intent by the decedent that Plaintiff should remain the beneficiary.

TOPIC: Change of beneficiary form ten days before insured's death is questionable enough to justify a dispute.
 TITLE: Texas Life Insurance Company, Plaintiff-Appellee, v. ..., 2020-Ohio-570
 COURT: Court of Appeals of Ohio, Eighth District
 COUNTY: Cuyahoga
 DATE: February 20, 2020

Severn Wainwright executed a life insurance policy in 2014 with Texas Life Insurance Company with his three children as co-beneficiaries. On December 5, 2016, just ten days before his death, Severn executed a change of beneficiary form where he made his sister Valerie Peck the sole beneficiary. Decedent's son Severn III disputed the change of beneficiary form and filed an action against Peck and Texas Life Insurance.

The insurance company cross-claimed for interpleader. In March 2018, the insurance company released the funds to Peck's counsel to hold until further order from the trial court and the action continued with Peck and the Wainwright children. After lengthy discovery proceedings the trial court eventually granted summary judgment for Peck which was unopposed in November 2018.

In December 2018, Peck filed for attorney's fees under R.C. 2323.51 and Civ.R. 11. The trial court denied the motion finding that the change in beneficiary form so close to the death was a

questionable circumstance and the children, though unsuccessful, were justified in pursuing it. The appellate court agreed with the trial court's finding and upheld the judgment.

MENTAL ILLNESS – CIVIL COMMITMENT

TOPIC: Totality of circumstances test can provide clear and convincing evidence of a mentally ill person subject to court order.
 TITLE: In re C.J., 2019-Ohio-4403
 COURT: Court of Appeals of Ohio, Twelfth District
 COUNTY: Butler
 DATE: October 28, 2019

C.J. was found to be a mentally ill person subject to court order by the magistrate, and the decision was adopted by the probate court. His treating physician at Beckett Springs Hospital, Dr. Kaneria testified that C.J. was suffering from major depressive disorder, and was unable to take care of himself, sleep or eat as a result. Dr. Kaneria stated that C.J. refused to take his prescribed medication or participate in treatment. C.J. testified that he never had any depression and disputed the diagnosis. C.J. admitted that he did not intend to seek treatment for depression and maintained that he only suffered from insomnia.

C.J. appealed the decision arguing that there was no clear and convincing evidence that he was a mentally ill person subject to court order. The appellate court upheld the decision reasoning that the totality of the circumstances including the record and Dr. Kaneria's testimony provided clear and convincing evidence and therefore the trial court did not err in its findings.

NAME CHANGE

TOPIC: The trial court is acting within its discretion to require the party seeking the name change to show that it is in the child's best interest
 TITLE: In re M.J., 2019-Ohio-2065
 COURT: Court of Appeals of Ohio, Third District
 COUNTY: Auglaize
 DATE: May 28, 2019

Under R.C. 2717.01 (A), the probate court may order a name change if the application proves "reasonable and proper cause for changing the name." Mother appealed decision denying her petition to change the surname of her minor child (M.J.) from the appellee/natural father's surname to mother's maiden name.

On appeal, Mother asserted that the trial court had not adequately considered the factors stated in In re Willhite, 85 Ohio St.3d 28, 1991-Ohio-201, in which the Supreme Court held that trial courts consider the following factors:

[T]he effect of the change on the preservation and development of the child's relationship with each parent; the identification of the child as part of a family unit; the length of time that the child has used the surname; the preference of the child if the child is of sufficient maturity to express a

meaningful preference; whether the child's surname is different from the surname of the child's residential parent; the embarrassment, discomfort, or inconvenience that may result when a child bears a surname different from the residential parent's; parental failure to maintain contact with and support of the child; and any other factor relevant to the child's best interests.

Father's surname is listed on M.J.'s birth certificate. But, Father had not seen the child since early 2013 but was current in his child support and had medical insurance for M.J. through his employer. M.J. enrolled in school in 2014 using the mother's maiden name, and Mother stated that M.J.'s friends and teachers only know her by her surname. Mother stated that M.J. is confused when her father's surname is used for her.

Father opposed the name change because sharing a common last name was his only bond with M.J. Father testified that the mother had impeded his ability to have a relationship with his daughter and kept him from having her contact information, which the mother denied.

The Appeals Court upheld the trial court and found no abuse of discretion in holding that the mother failed to satisfy her burden that the name change was in her child's best interest. The only evidence brought by the mother was the child's confusion, which both the trial and appellate court deemed to be a problem created by the mother's lack of honesty with her own daughter. The Court agreed with the trial court's reasoning that to change the name at this point would alienate any possible relationship between M.J. and her natural father.

TOPIC: Name change dismissed if no reasonable cause for the change.
 TITLE: In re the Name Change of S.D.L., 2019-Ohio-2950
 COURT: Court of Appeals of Ohio, Sixth District
 COUNTY: Huron
 DATE: July 19, 2019

Willie Otis appealed the decision of the trial court denying and dismissing his application for name change of his natural daughter S.D.L. Though Otis has never had a relationship or custody of his daughter, he has paid child support and written letters from prison. On the birth certificate, S.D.L.'s mother C.C. gave S.D.L. the surname of her legal custodians W.L. and R.L. who have been her residential family since leaving the hospital. Otis argued that it was in S.D.L.'s best interest to have his surname because it would create a "natural and symbolic connection to her biological father." The trial court dismissed the application finding that he had failed to show reasonable and proper cause for the name change. The appellate court found no abuse of discretion and upheld the decision of the trial court.

TOPIC: Name change applications are a special statutory proceeding where service by publication is governed by R.C. 2717.01, not Civil Rules.
 TITLE: Name Change of Rowe, 2019-Ohio-4666
 COURT: Court of Appeals of Ohio, Fourth District
 COUNTY: Scioto
 DATE: November 5, 2019

Mather applied for name change of minor requesting his last name be changed from father's to hers. She listed his name on the application and did not supply an address, instead checking a box that the address was unknown. Mother stated that father had not had contact with the child for three years. Mother was instructed to publish the hearing at least once, at least 30 days prior, and submit proof of publication to the court pursuant to R.C. 2717.01. Mother complied and the trial court granted the name change.

Father appealed arguing that Mother's service was not proper because it violated numerous requirements of Civ.R. 4.4. The appellate court concluded that Civil Rules did not apply to the service by publication because the application was a special statutory proceeding and therefore R.C. 2717.01 requiring one publication prevailed.

TOPIC: Name change determination will be upheld if the trial court considered the relevant factors where father wanted step father to adopt and not just change name.
 TITLE: In re K.C.M., 2019-Ohio-5182
 COURT: Court of Appeals of Ohio, Fifth District
 COUNTY: Fairfield
 DATE: December 12, 2019

K.C.M. was born on April 1, 2014. K.C.M.'s biological parents were never married, and her last name was her mother's maiden name. Bio Father never had a relationship with K.C.M. but paid child support and medical expenses after paternity was established in 2015. In May 2018 Mother filed a name change application to change K.C.M to K.C.Y. because she had married in 2016, and had a new baby and wanted K.C.M.'s name to match the family. Father opposed the name change arguing that the name should not be changed unless the step-father agreed to adopt K.C.M. and take full legal and financial responsibility for her. In February 2019, the trial court approved the name change. Father appealed. The appellate court found that the trial court duly considered the relevant factors and the decision was not unreasonable, arbitrary or unconscionable.

PROBATE PROCEDURE

TOPIC: Res Judicata bars an appeal claim nine years after the judgment.
 TITLE: Matter of Fischer, 2019-Ohio-4749
 COURT: Court of Appeals of Ohio, Fifth District
 COUNTY: Morgan
 DATE : November 18, 2019

Travis Fischer was a minor injured in an auto accident in 2008. In 2009, the probate court approved a settlement from Progressive Insurance and ordered the net \$4,102.86 be deposited in Fischer's name. In 2009, Fischer was sentenced to thirty years to life for aggravated murder, rape, aggravated burglary, grand theft, and arson. In 2010, the probate court ordered the bank holding the settlement funds that were due to be released to Fischer when he reached the age of majority to release the funds to pay outstanding court costs and indigent attorney fees in three cases including the criminal case.

In 2019, Fischer filed a pro se motion to vacate the 2010 judgment entry ordering the disbursement of the settlement funds. The probate court denied the motion to vacate finding that the matter had been previously decided. Fischer appealed claiming the trial court abused its discretion in denying his motion. Fischer argued that the 2010 disbursement order was a void judgment and personal injury proceeds are exempt from collection for court costs under R.C. 2329.66(A)(12)(c). The appellate court found the claim to be untimely and found that Fischer could have raised the issue on direct appeal in 2010, and that this claim nine years after the judgment was barred by res judicata.

TOPIC: Probate court does not have jurisdiction over annulments brought by a guardian on behalf of a ward.
 TITLE: Nixon v. Day, 2019-Ohio-3335
 COURT: Court of Appeals of Ohio, Fifth District
 COUNTY: Tuscarawas
 DATE: August 16, 2019

Tanny Day moved in with widower Fred Nixon in 2014. She agreed to help him with household chores in exchange for room and board. She also assisted him with medications, medical appointments and other needs. Fred and Tanny applied for a marriage license on August 7, 2018 in Tuscarawas County. Fred appeared confused and could not answer questions, so the clerk did not issue the license and told the magistrate there were concerns about Fred's competency.

On August 10, 2017 Tanny had a friend Vicki drive her and Fred to Steuben County, Indiana where they were issued a marriage license. Vicki testified that she did not believe Fred was competent to get married. On August 15, 2017, the Tuscarawas probate clerk officially denied the marriage license application. That same day the probate court granted and emergency guardianship and on August 22, 2017 Attorney Miller was appointed as Fred's guardian.

Attorney Miller filed a complaint for declaratory judgment from the probate court to annul the Indiana marriage. On November 13, 2018 the probate court delivered its opinion annulling the Indiana marriage. Tanny appealed on grounds the probate court did not have jurisdiction to annul a marriage. The appellate court reversed and vacated on the grounds that the probate court does not have jurisdiction over annulments, they must be brought in domestic relations or the general common pleas. However the Court noted that since a guardian can bring a divorce action on behalf of a ward, there is no reason they cannot also bring an annulment.

TOPIC: A trial court may not consider a motion for visitation when the motion does not comply with proper service of process.
 TITLE: In re Guardianship of Gelsinger, 2019-Ohio-4584
 COURT: Court of Appeals of Ohio, Eighth District
 COUNTY: Cuyahoga
 DATE: November 7, 2019

Douglas Gelsinger applied for guardianship of his son Dougie amidst a contentious divorce from Dougie's mother Paulette Funk. Dougie has cerebral palsy, developmental delay, brittle bone disease, epileptic seizures, and anxiety. Gelsinger did not list Funk as next of kin, but she heard about it otherwise and alerted the court which then scheduled a full hearing to allow Funk to apply herself or seek counsel. On the day of the hearing, Funk filed a motion for visitation and called two witnesses to testify to the hostile relationship with Gelsinger and his family. Gelsinger argued that visitation was not in the best interest of Dougie.

The magistrate appointed Gelsinger as guardian and granted visitation to Funk, and the trial court adopted the decision. Gelsinger appealed arguing that he had not been provided notice that the court would hear arguments on visitation. The appellate court reversed and remanded the decision because the motion for visitation failed to comply with service of process. The probate court will rehear the motion for visitation with proper notice and in compliance with rules of civil procedure.

TOPIC: A bank is not required to place restrictions on an account when the only court orders they received did not restrict the funds.
 TITLE: In re B.M., 2020-Ohio-1150
 COURT: Court of Appeals of Ohio, Seventh District
 COUNTY: Jefferson
 DATE : March 25, 2020

B.M., a minor, sustained injuries as a result of an automobile accident and received a \$39,210.98 settlement. The probate court appointed B.M.'s mother as guardian of B.M. and ordered that the net settlement proceeds be delivered to her as guardian of the minor. A guardianship account was opened in the name of "Amber L. Mayfield Guardian for B.M." Following the language of the Settlement Entry and the Distribution Entry, Huntington Bank did not restrict the funds.

B.M.'s counsel later sent Huntington Bank a Receipt of Depositary Form which included language that Huntington agrees to hold the funds subject to further order of the Court. The form was not signed by the probate judge. A Huntington Bank representative signed the form as a matter of course.

Guardian later withdrew all funds from the account. The probate court granted B.M.'s motion finding it was Huntington Bank's duty to flag and restrict the guardianship account and ordered them to return all funds withdrawn by Guardian.

The appeals court reversed stating the Bank followed the probate court's orders which did not restrict the funds. Unlike the Entries, the Form sent by B.M.'s attorney did not contain any directive from the probate court and was not signed by the probate judge. The appeals court concluded that the after-the-fact form provided by B.M.'s counsel does not trump the two duly issued court orders which directed that the funds, in this case, be unrestricted.

TOPIC: Trial court may not summarily limit the participation of attorneys even if they are likely to be witnesses at trial.
 TITLE: Krueger v. Willowood Care Ctr. of Brunswick, Inc., 2019-Ohio-3976
 COURT: Court of Appeals of Ohio, Ninth District
 COUNTY: Medina
 DATE: September 30, 2019

Krueger, as the executor of the estate of Camillo Valente, filed a complaint against Willowood Care Center of Brunswick, Inc., and multiple John Doe defendants, alleging claims including medical negligence, wrongful death, and spoliation of evidence. Appearing as counsel were Attorneys Joseph Condeni and Eric Valente. Krueger, also an attorney, filed a notice of appearance as additional counsel. Both the plaintiff and defendants filed witness lists identifying Krueger and Valente as witnesses.

The trial court limited Krueger and Valente in their roles as counsel, permitting them "to sit at the trial table and passively engage in the representation of the [p]laintiff," but barring them from "actively participat[ing] in the trial by questioning witnesses, interposing objections or giving opening or closing statements." Krueger appealed this decision claiming the trial court abused its discretion in summarily barring and disqualifying the two attorneys.

The appeals court stated the trial court should disqualify counsel only if, the court is satisfied that real harm is likely to result from failing to disqualify. The appeals court reversed the trial court holding that although the two attorneys may be called as witnesses at trial the court failed to complete the correct analysis to disqualify. The appeals court remanded for a determination whether they are necessary witnesses and whether real harm was likely to result from them participating fully at trial.

TOPIC: A two part analysis must be used to disqualify an attorney under Prof.Cond.R. 3.7.
 TITLE: In re Estate of Tuttle, 2019-Ohio-5363
 COURT: Court of Appeals of Ohio, Sixth District
 COUNTY: Erie
 DATE: December 27, 2019

Ruth Tuttle died testate on February 16, 2018. Her daughter Judith Rengel applied to admit the will to probate in Erie County. The will named Rengel and her brother Gordon Fowler as co-executors. Fowler and his son Ronald Fowler challenged Erie County's jurisdiction and sought to transfer venue to Fairfield County. Attorney D. Jeffery Rengel filed as co-counsel in January 2019, and the Fowlers moved to disqualify him under Prof.Cond.R. 3.7, because he was the decedent's son in law and former housemate and they planned to call him as a witness. In February, the trial court granted the motion and removed him as attorney of record.

Judith Rengel appealed. The appeals court overturned the trial court finding it had abused its discretion in not applying a two part analysis where it must first find that the attorney is likely to be a necessary witness, and if so, if one of the three listed exceptions in the rule applied. To assist the court's determination of whether the witness is necessary, the moving party must prove the attorney will provide "testimony that is material and relevant, and unobtainable elsewhere," the moving party must assert more than a mere intent to use the attorney as a witness, the moving party must show that "it is likely that the attorney would need to testify," whether the "trier of fact may be confused or misled," and whether the "moving party's rights would be prejudiced."

The appeals court found that the Fowlers had not shown Attorney Rengel had testimony that was material and relevant to the venue issue or any other issues.

TOPIC: Deny motion to admit out-of-state counsel where counsel is a necessary witness at trial.
 TITLE: Krugliak, Wilkins, Griffiths & Daughtery Co. L.P.A., v. Lavin, 2020-Ohio-3123
 COURT: Court of Appeals of Ohio, Fifth District
 COUNTY: Stark
 DATE: May 27, 2020

Defendant moved for admission pro hac vice of his Attorney for the limited purpose of assisting in discovery. The trial court denied Defendant's motion based upon the attorney's role as a necessary witness in the case. The appeals court found no abuse of discretion when declining to admit out-of-state counsel where counsel is a necessary witness at trial.

TOPIC: Mistaken designation of an affirmative defense can be considered as a counterclaim under Civ.R. 8 (C).
 TITLE: James E. Murphy, JR., et al., Plaintiffs-Appellants, v...., 2020-Ohio-163
 COURT: Court of Appeals of Ohio, Eleventh District
 COUNTY: Trumbull
 DATE: January 21, 2020

Margaret A. Hall served as executor of her sister Catherine M. Murphy's estate. Hall understood her sister's wishes to be that the decedent's two life insurance policies from Cigna, one worth \$94,000 and the other worth \$187,000 were to be divided so that the smaller was equally shared amongst decedent's nieces and nephews, and the larger divided equally amongst decedent's 7 surviving siblings including Hall. In October 2015, Hall sent checks to each sibling, niece and nephew according to that plan, even though she was the only listed beneficiary on each policy.

It was Hall's belief that the decedent intended the remaining 403(b) retirement plan for Hall's benefit. Decedent's other siblings filed a complaint for declaratory judgment against Hall for the 403(b) plan account. Decedent's attorney Joshua Garris, decedent's friend Stella Maiorana, and Hall all testified that the decedent intended for Hall to receive the bulk of her assets. The trial court denied the complaint in November 2017, and the appeals court reversed and remanded in January 2019 because the change of beneficiary form for the 403(b) clearly stated the siblings were to receive 14% each of that account.

On remand, in March 2019, the trial court issued a judgment addressing the previous unconsidered affirmative defense from Hall that she is entitled to a set-off against the claims from the plaintiffs because of the life insurance proceeds she had already delivered to them. The court found that justice required that it treat the affirmative defense as a counterclaim under Civ.R. 8(C). The court found that the decedent's clear intention was for Hall to receive the bulk of her assets and that Hall was entitled to a set-off. The 14% due each sibling from the 403(b) account was reduced by the amount she had already given them and the remaining 2% was ordered to be paid to Hall's estate.

The siblings once again appealed the decision of the trial court, and this time the appeals court upheld the decision finding that it was not erroneous to consider the affirmative defense as a counterclaim, nor was the decision against the manifest weight of evidence.

TOPIC: Receiving a check with an Ohio address is not enough to establish personal jurisdiction under the long arm statute.
 TITLE: Schwab v. wallace, 2020-Ohio-560
 COURT: Court of Appeals of Ohio, Fifth District
 COUNTY: Stark
 DATE: February 18, 2020

Mary Schwab and her brother David Schwab are beneficiaries of a family trust in Florida created by their father. David and his father were involved in litigation in Florida. Mary brought a lawsuit against David alleging breach of fiduciary duties. One of the claims involved a check sent to David from an Ohio bank. David filed for Motion to Dismiss and directed verdict in his favor. The trial court granted these requests finding that Mary had failed to show damages since the trust was not

harmed, failed to show evidence of a breach of fiduciary duty, and did not establish personal jurisdiction over David or that Stark County was the proper venue. Mary appealed, and the appellate court upheld the decision, stating the mere fact that David received a check with an Ohio address did not amount to transacting business in the state. Further there was no evidence that the Trust suffered any damages.

TOPIC: Internet Search not a mandatory prerequisite to establish reasonable diligence for service by publication
 TITLE: Corrao v. Bennett, 2020-Ohio-2822
 COURT: Court of Appeals of Ohio, Eighth District
 COUNTY: Cuyahoga
 DATE: May 7, 2020

Defendant appeals a default judgment entered by the trial court because service by publication was improper. Plaintiff attempted service twice upon Defendant at the address on the police report. After this failure Plaintiff attempted to obtain Defendant's current address from his insurance company but the insurance company refused to release it. Defendant alleges that Plaintiff should have made additional efforts such as an internet search and BMV check. The appeals court affirmed that service by publication was proper and an internet search was unnecessary. Appeals court did remand the case for a hearing on damages since the amount awarded exceeded the amount stated by Plaintiff.

TOPIC: Contempt finding proper for failure to comply with probate court order and absent a transcript the finding must be affirmed.
 TITLE: In re Estate of Jackson, 2020-Ohio-4334
 COURT: Court of Appeals of Ohio, Sixth District
 COUNTY: Erie
 DATE: September 4, 2020

Appellees Brenda Jeter and Paul Moore, as co-executors of the estate of Starlin Jackson, filed a complaint for concealment of assets. The complaint alleged that Appellant was in possession of real and personal property which were estate assets. Appellant's answer claimed that the decedent authorized the transfer of real property to Cold Water Capital, LLC, of which appellant was the "authorized representative," and it was not to be included in the estate. Appellant further claimed mismanagement of City Service Taxi, LLC, by co-executor, Paul Moore, and resulting "financial damage."

The probate court found appellant guilty of conveying and having possession of assets of the estate. The court ordered that appellant convey from Cold Water Capital, LLC, of which he was the sole member, seven parcels of property and turn over the rent in his possession or control. Appellant was further ordered to turn over to appellees all assets within his control, including vehicles and equipment, belonging to City Service Taxi. The judgment specified that appellant had 14 days to comply following its receipt. Appellant failed to comply with the court order and the court found Appellant in contempt pursuant to R.C. 3767.07 and 2705.05(A)(1) sentencing him to 30 days in jail.

The appellant court upheld the order ruling that the absence of a transcript of the hearing on a contempt motion requires that this court presume the regularity of the proceedings and affirm the trial court's decision. This is so because without a complete record, we are unable to ascertain the basis for the trial court's judgment to determine if it was in error.

TRUSTS

TOPIC: Trustee duty to report in a revocable trust is only to the settlor while the settlor is living.
 TITLE: Hasselbring v. Bernard, 2019-Ohio-2812
 COURT: Court of Appeals of Ohio, First District
 COUNTY: Hamilton
 DATE: July 10, 2019

Hasselbring as beneficiary of a revocable trust sued Bernard, trustee for a full report of the trust's assets. The trial court granted summary judgment to Bernard finding that a trustee of a revocable trust only owes a duty to the settlor while the settlor is still living. The appellate court upheld the decision holding that R.C. 5808.13 (G) is specific to revocable trusts and distinguishes them making clear the duty is only to the settlor while the settlor is living.

TOPIC: A settlement agreement must serve the Trust's purpose and provide benefit to the beneficiaries.
 TITLE: Matter of Roudebush, 2019-Ohio-3955
 COURT: Court of Appeals of Ohio, Seventh District
 COUNTY: Carroll
 DATE: September 30, 2019

Jay Roudebush transferred the family home to his daughter Beverly who lived with him and established a trust for the benefit of himself and his daughter. The house and an oil and gas lease are the only assets of the trust. Beverly's brother Ronald was the initial trustee. Jay and Ronald are now both deceased. Neighbor of the trust property Jeffrey Bory claimed that he notified Beverly in 2002 that a portion of the trust property driveway encroached on his property, but gave her permission for its use at that time. In 2009, Beverly's brother Martin moved into the trust property and allegedly began actions to make it look like the encroachment belonged to the trust property.

Bory sent a letter to Beverly and Martin revoking permission to use the driveway in September 2015. The parties tried to settle the disagreement by relocating the driveway but disagreed as to the division of costs. In November 2015, Bory filed complaint seeking declaratory judgment that the encroachment was on his property. In December 2015, Beverly and Martin counterclaimed asserting that the Trust had adversely possessed the land in question. After Ronald's death in 2016, the court appointed attorney Sean Smith to serve as successor trustee. The general division granted declaratory judgment to Bory that the driveway encroached his property, but the adverse possession counterclaim survived summary judgment.

Attorney Smith filed a motion with the probate court in May 2018 to approve a settlement agreement. The settlement agreement provided:

Bory promised to dismiss the trespass claims filed against Beverly and Martin, individually. Bory will grant Beverly a license to continue to use the driveway in its current location. However, the license will terminate in the event that the Trust property is sold, transferred, or if Beverly stops using the house as her permanent residence. When any of these events occur, the Trust or new resident must relocate the driveway onto the Trust property within one year of the event. In return, the Trust agreed to dismiss its adverse possession claim and concede that some portion of the end of the driveway is located on Bory's property. The Trust will allow Bory access to the drive in order to maintain other portions of his property. The final component of the agreement creates an option. Option one requires the Trust to execute a promissory note in the amount of \$29,000 secured by a mortgage on the Trust property in favor of Bory. The note becomes due on one of the following events: (1) if the property is transferred out of the Trust, (2) if Beverly stops using the Trust property as her permanent residence, or (3) on termination of the Trust. Annual interest (1.29%) on the note must be paid by the Trust to Bory while Beverly continues to possess the house. The second option allows the Trust to avoid mortgaging the property to secure a note and instead pay the costs of relocating the driveway and assign to Bory the royalties under an existing oil and gas lease. (20-21)

The probate court granted the motion for approval of the settlement. Beverly and Martin appealed arguing that the settlement agreement violates trust provisions that require the trustee to provide for the beneficial use of the property. The house is worth \$60,000. The appellate court found that an agreement taking away half the value of the house and ignoring other viable options was clearly disproportionate and unfair. The appellate court agreed found no evidence to support the agreement and remanded for a full evidentiary hearing to determine if the parties can reach an appropriate settlement.

TOPIC: Trust clearly granted surviving settlor the authority to revoke and withdraw assets.
 TITLE: McCoy v. McCoy, 2019-Ohio-5227
 COURT: Court of Appeals of Ohio, Fifth District
 COUNTY: Guernsey
 DATE: December 12, 2019

Dick McCoy and Karen Sue McCoy married in 1989 and formed an A-B-C Trust in 1997 to minimize tax liability for their estate upon death. At the time of the formation of the trust, the estate tax credit was \$600,000. At the time of Dick's death in 2016, the estate tax credit had increased to \$5,450,000. Six months after Dick's death, Karen revoked the trust and transferred all of the shares of the couple's hardware business to herself. Dick's sons from a previous marriage, Cameron McCoy and Brandon McCoy challenged her authority to revoke the trust.

In November 2017, Karen then filed a declaratory judgment complaint seeking an order that she had validly terminated the trust and transferred the hardware interest. In December 2017, Cameron and Brandon filed an answer and counterclaims for tortious interference of expectancy of inheritance among others. The trial court issued judgment adopting Karen's facts and conclusions of law. The trial court found that the trust gave Karen authority to revoke the trust and withdraw assets, that she had acted properly, and that she was now the sole owner of the hardware business.

Cameron and Brandon appealed arguing that the trust was irrevocable unless it expressly provided otherwise, because it was created before 2007, and that Karen was not the grantor of the hardware stock so she had no authority to withdraw shares. Upon close examination of the will and trust agreement, the appellate court found the trust was unambiguous and clearly granted Karen the authority to revoke and withdraw assets. The appellate court therefore affirmed.

TOPIC: A prior settlement agreement was proof of constructive knowledge of possible breach sufficient to trigger statute of limitations under R.C. 5810.05.
 TITLE: Helton v. Fifth Third Bank, 2019-Ohio-5208
 COURT: Court of Appeals of Ohio, First District
 COUNTY: Hamilton
 DATE: December 18, 2019

The Clarke siblings became income beneficiaries of two trusts in 2015 when their mother passed away. The trusts established in 1939 by William C. Sherman for his brother John Q. Sherman and his niece Helen Hook Clarke (Clarke siblings' mother) had Fifth Third as the sole trustee since 1980. The trusts were funded with shares from Sherman's paper company Standard Register. Shares owned by trusts or family members in the company had super-voting rights resulting in "negative control" which permitted them to block certain actions of the company. Fifth Third tried several times to diversify the trusts and lessen the trusts' concentration in Standard Register stock. However the Clarke family was opposed to diversification and in 1986 sued Fifth Third to prevent it from selling the Standard Register stock. The parties eventually entered a settlement agreement in 1987. Between 1981 and her death in 2015, Helen received distributions amounting to 72 million dollars from the trusts.

The value of the Standard Register stock declined over time, but circumstances including the family's ongoing opposition prevented Fifth Third from diversifying the trusts. In 2008, Fifth Third filed a Schedule 13D with the SEC after Standard Register rejected an offer to sell. In 2013, Standard Register merged with Workflow One. In 2015 Standard Register filed for bankruptcy and the two trusts had declined to almost zero. On August 31, 2015, the Clarke siblings filed claims against Fifth Third for breach of duty to diversify, breach of duty of impartiality, and unjust enrichment. The trial court granted summary judgment to Fifth Third on all counts finding they were outside the statute of limitations in R.C. 5810.05 and barred by the equitable doctrine of laches.

The appellate court upheld the trial court's decision that the breach of duty to diversify claims were barred by the statute of limitations. This was based on the fact that the Clarke siblings knew the trusts remained undiversified since the settlement of 1986-87 when they had insisted upon it. The appellate court upheld the finding that the claims for breach of duty of impartiality and breach of trust/fiduciary duty stemmed from the same alleged failure to diversify and accordingly were also barred by the statute of limitations. The appellate court however found the misconduct alleged in the unjust enrichment claim was separate from the breach of duty to diversify claims because it was based on the alleged taking of fees from the trust which was a different claim. And the appellate court therefore remanded this one single claim.

TOPIC: Gift balancing clause results in brother having no evidence of owning trust assets which is necessary for a conversion claim.
 TITLE: Hutchings v. Hutchings, 2019-Ohio-5362
 COURT: Court of Appeals of Ohio, Sixth District
 COUNTY: Sandusky
 DATE: December 27, 2019

In 2012, Charles Hutchings gave durable power of attorney to his son John which granted him authority to create a new revocable or irrevocable trust, and gave permission for self-dealing. John executed an irrevocable trust on behalf of his father in 2013. This trust named John and his brother Chip as beneficiaries and included a gift-balancing clause that would offset the gifts given to John and Chip during their parents' lifetimes. Their mother Elise kept records of monies and gifts given to their sons and kept this information in a lockbox. After their deaths in 2014, John sold the home and personal property and calculated the gift balancing. John totaled lifetime gifts to Chip's family of over \$400,000 and \$120,000 to John's family. The proceeds from the trust amounted to \$300,000 with no distribution to Chip after the balancing.

Chip filed suit complaining of conversion of his inheritance through John's wrongful insertion of the gift balancing clause that Chip asserted was against his parents' intentions. After a three day trial, a jury verdict in favor of Chip awarded him half of the remaining trust and compensatory damages. The trial court denied John's motion for judgment notwithstanding the verdict.

The Appellate court found that John had express authority to execute the trust including any terms he deemed appropriate. Chip failed to demonstrate that the properly executed trust was invalid, or that there was any undue influence or other wrongful act. Therefore the trust was valid and properly executed and the gift balancing provision left Chip with nothing. This resulted in Chip not having any ownership or possession of trust assets, which is a key element in a claim of conversion. The Appeals court reversed the judgment.

TOPIC: An inter vivos trust that does not expressly exclude adult adopted persons does not mean that settlor intended to include adult adoptees as beneficiaries.
 TITLE: KeyBank National Association v. Firestone, 2019-Ohio-2910
 COURT: Court of Appeals of Ohio, Eighth District
 COUNTY: Cuyahoga
 DATE: July 18, 2019

D. Morgan Firestone (Settlor) created an irrevocable trust in 1960 that entitled his ex-wife Nancy to Trust income during her lifetime, and provided for its distribution after her death. The trust stated:

Upon [Nancy's] death, the trustee shall distribute the then principal of the [T]rust estate to the then living descendants of the settlor in equal shares per stirpes. The term "descendants of the settlor" shall include Amy Morgan Firestone, David Morgan Firestone, and Jeffrey Bryan Firestone, and any child or more remote descendant of the settlor who shall be born after the date of this instrument.

In 1974, the Settlor remarried and adopted his wife's two adult daughters. Nancy died in May 2016, and KeyBank requested a determination from the court as to whether Cindy Firestone and Deborah Lynn Boylen Firestone, the adoptive daughters, were excluded as beneficiaries of the trust.

Cindy filed a motion for judgment on the pleadings, asserting that she was beneficiary pursuant to the plain language of the trust under R.C. 3107.15 (A)(2), and that although R.C. 3107.15 (A) (2) applied to her retroactively, R.C. 3107.15 (A) (3) did not because it posed an unconstitutional burden. The natural children responded with a cross-motion arguing that the trust must be interpreted according to the legal effect and meaning of the words upon its execution in 1960. They also argued that the legal term of "child" at that time included only blood relatives, and since adult adoptions were not permitted under Ohio law in 1960, the settlor did not intend to include an adopted adult as a member of the class of children.

The Appellate Court reviewed the ruling de novo and held that the settlor could not have intended for adult adoptees to be included in the class of "child [ren] or more remote descendant of the settlor who shall be born after the date of this instrument" because in 1960, when he was formulating the trust, he knew that adults could not be adopted under Ohio law.

The Court declined to extend judicial application of the stranger to adoption rule to the facts of this case. The Court also held that R.C. 3107.15 (A) (2) and (3) both applied retroactively, and R.C. 3107.15 (A) (3) (which bars adult adoptees from inheritance unless they are expressly named) was constitutional as applied in this case.

TOPIC: Childs caregiver role and help in drafting trust not enough for confidential relationship. Forfeiture clause in trusts apply to challenges to trust amendments.
 TITLE: Foelsch v. Farson, 2020-Ohio-1259
 COURT: Court of Appeals of Ohio, Fifth District
 COUNTY: Knox
 DATE: March 31, 2020

Settlor created a trust with herself as trustee which equally divided the trust assets to her seven children and which included two forfeiture clauses. Settlor later amended the trust several times. First to name only three of her children as successor trustees. She then distributed specific real estate to five of her children and left \$60,000 each to the remaining two children including Appellant. Upon Settlor's death, Appellant disputed the distributions and Appellees counter claimed seeking enforcement of the forfeiture clauses.

The trial court granted summary judgment dismissing Appellant's claims of undue influence, lack of capacity, and intentional interference with expectancy of inheritance and granted the counterclaim. The appeals court upheld the trial court's findings.

The trial court found there was no presumption of undue influence. Finding that both a child's caregiving role and the mere fact a child is involved in drafting the documents do not rise to a level of a confidential or fiduciary relationship. The trial court further found testimony that a child bossed and ordered Settlor around was insufficient evidence for a finding of improper influence.

As a result, Appellant's claim of intentional interference with expectancy of inheritance fails since it was based on undue influence as the tortuous act.

Appellant provided evidence that Settler had hallucinations, a deteriorating memory, and health, and was susceptible to the influence of others. The trial court found the evidence failed to establish Settlor was confused about her property or did not know what she was signing on the day of executing the amendments.

The trial court enforced the forfeiture clause against Appellant finding her argument that the clauses did not apply to her challenge of the amendments since the clauses were only stated in the original trust was against the definition of a trust found in R.C. 5801(W). The trial court further found that no good faith exception to forfeiture clauses exists.

TOPIC: Good cause for removal when trustees fail to distribute the trust at the required time.
 TITLE: Doran v. Doran, 2020-Ohio-1583
 COURT: Court of Appeals of Ohio, First District
 COUNTY: Hamilton
 DATE: April 22, 2020

Robert and Ida Doran each created trusts distributing assets in equal shares to their six children to be distributed after their deaths and after estate tax is paid. Prior to either's death the beneficiaries made an agreement where two of them agreed to exit from the family business and in exchange the remaining four beneficiaries would be personally liable for the estate tax. Robert died in 1993 and Ida died in 2004. In 2007, after the final estate tax liability was issued the trustees negotiated to pay in installments over several years. In 2017, the beneficiaries sued the trustees for breach of trust for a variety of reasons including failure to administer the trust solely in the interest of the beneficiaries and failure to distribute.

The magistrate issued a decision, finding that trustees had been obligated to terminate Ida's trust in 2007 and Robert's trust in 2009. The trustees failed to do so and instead continued to administer the trusts well after the termination dates. At a hearing in September 2018, the probate court warned it may appoint interim trustees to be fair to all parties. At a status conference in December 2018, the probate court asked the trustees how much cash was remaining in the trust and the trustees said they did not have that information. The probate court, sua sponte, removed them and appointed interim trustees but did not journalize the judgment. The probate court entered judgment for the removal in April 2019 following another conference where both parties argued over removal.

The appeals court agreed that the trustees' failure to terminate the trust for years after the dates they were obligated to was a failure to administer the trust solely in the interest of the beneficiaries. The appeals court also agreed that the warning at the September hearing and the statement at the December conference was enough to give the trustees notice of removal in April.

TOPIC: Self-serving affidavit without corroborating materials will not defeat a well-supported motion for summary judgment.
 TITLE: Goddard v. Goddard, 2020-Ohio-3372
 COURT: Court of Appeals of Ohio, Eighth District
 COUNTY: Cuyahoga
 DATE: June 18, 2020

Plaintiff is a beneficiary of three trusts and Defendant, who is Plaintiff's father, is the trustee over the trusts. Plaintiff claimed that Defendant breached his fiduciary duties and sought his removal as the trustee of all three trusts. Defendant moved for summary judgment. The trial court granted summary judgment on two of the trusts because the claims were barred by the four-year statute of limitations. Plaintiff conceded there were no genuine issues of material fact in regard to two of the trusts.

The trial court granted summary judgment on the final trust finding that the statements in Plaintiff's affidavit were contradicted by the record. The trial court found that Plaintiff's assertion that he did not sign the trust was in direct conflict with an email sent to him regarding the trust. Additionally, Plaintiff provided no corroborating evidence to demonstrate that his signature on the instruments was not authentic. Plaintiff appealed arguing that a genuine issue of material fact exists as to the execution of the final trust.

The appeals court affirmed the trial court's decision to grant summary judgment in favor of defendant relating to three trusts. A nonmovant may not rely on his own unsupported and self-serving assertions, offered by way of affidavit and without corroborating materials, to defeat a well-supported motion for summary judgment.

TOPIC: Cemetery trusts are permitted to pay the capital gains taxes using the trust's principle
 TITLE: Crown Hill Cemetery Assn. v. Maxfield, Dir., Ohio Dept. of Commerce, 2020-Ohio-3433
 COURT: Court of Appeals of Ohio, Tenth District
 COUNTY: Franklin
 DATE: June 23, 2020

Crown Hill twice withdrew principle from the cemetery trust to pay the federal and state capital gains taxes for the trust. This case involves a dispute between the applications of two revised code statutes to cemetery trusts. R.C. 1721.21 prohibits trustees from removing principle or capital gains from cemetery trusts. R.C. 5812.46 applies to all Ohio trusts and provides "a tax required to be paid by a trustee based on receipts allocated to principal shall be paid from principle." The trial court held that they were permitted to pay the capital gains taxes using the trust's capital gains.

Under R.C. 1.51 when there is a conflict between provisions the special provision prevails as an exception to the general provision unless the general provision is later adopted and the intent is that the general provision prevail.

The appeals court agreed with the trial court that R.C. 5812.46 contains more specific provisions since it specifically addresses trust income taxes while R.C. 1721.21 just applies to cemetery trust generally. They rejected the argument that because R.C. 5812.46 applies to all trusts it is the general provision. The appeals court found R.C. 5812.46 to be the specific provision and thus applied over R.C. 1721.21. Also, since R.C. 5812.46 is later adopted and the legislative intent is that it applies to all trusts, even if it is the general provisions it prevails.

TOPIC: Discretionary power to spend does not allow trustees to transfer assets allocated by Will.
 TITLE: In Re Trust Created by Item IX of the Will of Mellott, 2020-Ohio-3738
 COURT: Court of Appeals of Ohio, Seventh District
 COUNTY: Belmont
 DATE: June 29, 2020

Mellott created three trusts in his Will at issue here are Trusts B and C. Trust B's purpose was to pay the operating cost of the Bellaire Library and Trust C's purpose was for the upkeep and remodeling of the library building. Trust C was funded by specific bank shares while Trust B received all other assets.

The Trustees of Trusts B and C transferred real property and mineral rights to Trust C from Trust B. The library board challenged this transfer of assets because they wanted the assets to remain in Trust B to help pay operating costs. The probate court ruled in favor of the Trustees relying on a prior ruling interpreting the trusts which placed real estate in Trust C. The appeals court reversed stating that the prior ruling only applied to the real estate where the library was built and that all other real estate is allocated to Trust B by the terms of Mellott's will.

The appeals court found trustees' discretion to determine the best way to utilize funds did not include the discretion to allocate funds contrary to Mellott's intent. Trustee's lacked the discretionary power to move assets to Trust C which the Mellott's will allocated to Trust B.

TOPIC: No trust upheld when there is no evidence requiring a constructive trust or evidence that a trust was intended.
 TITLE: Johnson v. Kuehn, 2020-Ohio-3757
 COURT: Court of Appeals of Ohio, Seventh District
 COUNTY: Carrol
 DATE: July 10, 2020

This case concerns the non-probate assets of Heinrich Kuehn, consisting of two investment accounts and Heinrich's home. Both accounts listed Defendant as the beneficiary and a Transfer on Death Deed for the home listed him as the beneficiary. Plaintiff asserts either an express or implied trust was created giving her a one-half interest in the non-probate property.

Plaintiff supported this assertion with Heinrich's statement that he wanted Defendant to help Plaintiff if she needed it. Plaintiff also relies on the fact that Defendant asked the court for permission to rent the house, while Heinrich was living in a group home, stating that Heinrich

wished to retain the house for his daughter in the future. Defendant testified that he made this statement because Plaintiff had expressed her intention to buy the house in the future.

The appeals court affirmed the trial court's finding that there was no intention by Heinrich to create an express oral trust nor any circumstances requiring a constructive trust. Neither party presented any evidence that Defendant obtained the property through fraud, duress, mistake, or breach of fiduciary duty.

TOPIC: The terms of a trust prevail over a subsequently executed codicil when... Power-of-attorney must expressly authorize changes to beneficiaries of accounts.
 TITLE: In re Estate of Zoltanski v. Zoltanski, 2020-Ohio-3908
 COURT: Court of Appeals of Ohio, Sixth District
 COUNTY: Wood
 DATE: July 31, 2020

This is a consolidated appeal from three judgments of the probate court, for separate aspects of the Decedent's estate. The disputes are between two of Decedent's children, Stephen and Helen.

In the first and second cases, Stephen claims an interest in a 4-unit apartment complex. Decedent's codicil expresses intent for the complex to go to Stephen, however, a previously executed trust agreement transferred the complex to Helen upon Decedent's death. The trial court found the trust agreement controlled because the terms of the trust agreement do not expressly allow it to be revoked or amended by Decedent's will or codicil. Stephen argued that Decedent mistakenly thought the codicil completed the transfer and R.C. § 5804.15 allowed the court to reform the trust to correct the mistake. The trial court found that there was no mistake because the decedent made no efforts to change the title of the property. The appellate court affirmed.

In the third case, Helen sued Stephen for conversion, self-dealing, and breach of fiduciary duty. Using a power-of-attorney, Stephen transferred from Helen to himself seven accounts owned by Decedent. Stephen argues the valid power of attorney is a complete defense, and the trial court erred when it granted the funds to Helen. The appeals court found that the power of attorney Steven held fails to expressly authorize Stephen to change Helen's rights of survivorship or to change her beneficiary designation to the various bank accounts.

WILLS

TOPIC: Burden of proof for admitting a will to probate is on the proponent of the will to establish its validity.
 TITLE: In re L.M.W., 2019-Ohio-3873
 COURT: Court of Appeals of Ohio, Ninth District
 COUNTY: Summit
 DATE: September 25, 2019

In March 2017, Sheridan Hatter applied to have her mother's will dated July 18, 1991 admitted to probate. The court admitted the will and appointed Hatter as executor. In November 2017, decedent's granddaughter Michelle Wilson applied to have a will dated July 29, 2002 admitted to

probate. The 2002 will disinherited Hatter and had in terrorem clause that prevented Hatter from contesting. The magistrate held a hearing on the execution of the 2002 will. At the hearing the attorney who prepared the will and his secretary both testified as to its proper execution. The magistrate admitted the will to probate, and Hatter filed objections.

The probate court overruled Hatter's objections and concluded that Hatter had not met her burden of proof showing that the 2002 will was not properly executed. Hatter appealed and the appellate court found that the trial court had applied an incorrect burden of proof. The Court noted that this would not normally be subject to an appeal, but because of the in terrorem clause, this was the only opportunity for Hatter to be heard.

The Court found that the probate court had applied a standard used for will contest actions, and instead should have required Wilson as the proponent of the 2002 will to bear the burden of establishing its validity. The case was reversed and remanded in order for the probate court to apply the appropriate burden of proof in its decision.

On remand, the Court found that Wilson had met her burden and admitted the will.

TOPIC: Language used in a will is considered in deriving intent of the testator.
 TITLE: Bills v. Babington, 2019-Ohio-3924
 COURT: Court of Appeals of Ohio, Sixth District
 COUNTY: Huron
 DATE: September 27, 2019

Ronald Bills died testate on May 14, 2017. His surviving next of kin are his nephew Michael Bills, and a great niece and great nephew. Ronald's will left his entire estate after payment of debts and funeral expenses to "my beloved step-granddaughter, Erica K. Hemsath-Anderson, in fee simple, absolutely and forever, per stirpes." Erica predeceased Ronald, and left two surviving minor children. Michael brought action arguing that the gift to Erica lapsed upon her death under R.C. 2107.52. The administrator and Guardian Ad Litem for the children argued that the use of the term "per stirpes" in the context of the entire will showed an intent of the testator to make a secondary gift to Erica's heirs. The trial court found in favor of the minor children and agreed that the language of the will showed intent to make a secondary gift to Erica's heirs.

Michael appealed arguing that the trial court erred in failing to hold that the term "per stirpes" is only a mode of distribution. The appellate court upheld the decision of the trial court reasoning that although the term normally refers to mode of distribution, Ronald's intent in the estate plan was clear that he intended the secondary gift because language of the will was absolute and the will contained no other bequests nor mention of any other person.

TOPIC: Wills and trust docs discoverable if allegations in a counterclaim constitute waiver of privilege and documents that are relevant to the claims.
 TITLE: Edwards v. Edwards, 2019-Ohio-5413
 COURT: Court of Appeals of Ohio, Eleventh District
 COUNTY: Portage
 DATE: December 31, 2019

Walter Edwards Jr. and his spouse brought a civil action against Jr.'s step-mother Bridget Edwards for several claims including intentional interference with inheritance. Walter Sr. filed counterclaims and discovery ensued. Walter Sr. brought this appeal after the trial court granted a motion to compel discovery of Sr.'s will, trust, and estate documents arguing these documents were protected by attorney-client privilege.

The trial court granted the motion finding that no privilege had been asserted, or any potential privilege had been waived because they directly related to the litigation claims.

The 11th district found that the statutory privilege did not apply because the statute is applicable only to attorney testimony, however, common law privilege did apply. As to the waiver, the appellate court adopting the Hearn test found that Sr's responses in the answer and counterclaims waived privilege to the extent of factual allegations brought forth in those responses, but any extraneous items would remain privileged. The appellate court ordered the trial court to conduct an in camera inspection of the documents to determine what is relevant, and to instruct a protective order limiting the scope of the discovery to the relevant portions.

UNDUE INFLUENCE

TOPIC: Undue influence in a contested will decision upheld when the facts support the application of law.
 TITLE: Holden v. Holden, 2019-Ohio-5031
 COURT: Court of Appeals of Ohio, Twelfth District
 COUNTY: Butler
 DATE: December 9, 2019

Arch and Jean Holden executed wills in 1971 leaving their property to both their children Leslie and Greg equally. After Arch's death, Leslie lived with her mother and refused to allow her brother Greg to be involved in their mother's finances, though he still visited and helped with medical appointments. In May 2007, Jean changed her will leaving Greg one dollar and the rest to Leslie. Greg contested the will on grounds of undue influence and the magistrate found for Greg and deemed the will invalid. Leslie objected but her objections were not specific and she did not provide a transcript of the hearing. The trial court could not consider objections to factual findings. After applying the magistrate's findings of fact the court determined the applications of law were correct and adopted the magistrate's decision.

On appeal, Leslie filed a transcript, but the appellate court granted Greg's motion to strike because it was not properly in the record. The magistrate found that Jean had suffered from dementia,

memory loss, anxiety and depression, Leslie had the opportunity to exert undue influence, and she had excluded Greg from information. The magistrate further found that Attorney Gartner whom Leslie claimed had created the will testified that he did not recall writing or discussing the will and the circumstances of the will were outside his normal procedures. Leslie had not proven any motive for Jean to cut Greg out of the will and make Leslie the primary beneficiary. The appellate court upheld the decision finding no error in the application of law to the factual findings.

TOPIC: Undue influence finding upheld when evidence of susceptibility of the testator not related to time of signing of will
 TITLE: Wallace, et. al. v. Davies, 2020-Ohio-93
 COURT: Court of Appeals of Ohio, Ninth District
 COUNTY: Summit
 DATE: January 15, 2020

Dawn Wallace and her four siblings contested a later dated will of their mother Bonnie Becker. The later will devised 10% of her property to each of her five children and the remaining 50% to her grandson who was living with her at the time. The will appointed Mr. Davies, her ex-husband as executor, and the siblings alleged undue influence on the part of Mr. Davies. The probate court granted summary judgment to Mr. Davies finding there was no genuine issue of material fact as to the element of susceptibility. Deposition testimony of Attorney Mason who had prepared the will showed that Ms. Becker was competent and the will was at her request. Mr. Davies had briefly introduced himself and stated that he supported whatever Ms. Becker intended, then left the room.

Ms. Wallace did not meet her burden to show that a genuine issue of material fact existed. Ms. Wallace brought evidence of a motion from two years prior, unsupported assertions about Ms. Becker's medications, and events that occurred after Ms. Becker's death. None of this was sufficient to create a genuine issue of material fact regarding Ms. Becker's susceptibility or undue influence. The appellate court did not find any error.

TOPIC: Statements made referring to a past condition, state of mind, or mental feeling and do not reflect decedent's then existing state of mind are not admissible under Evid.R. 803(3).
 TITLE: Young v. Kaufman, 2020-Ohio-3283
 COURT: Court of Appeals of Ohio, Eighth District
 COUNTY: Cuyahoga
 DATE: June 11, 2020

Joyce revised her estate plan in 2010 making only three of her kids beneficiaries (Josh, Kim, and Doug). In 2013, Joyce purportedly made statements that the 2010 estate plan was a "sin," that "everything was supposed to be equal," and that Joyce was under "intense" pressure from Josh when she executed the 2010 estate plan. Joyce died before any new estate plan was finalized. In challenging Joyce's 2010 estate plan, Appellants claim undue influence by Josh and Kim. The trial court excluded the statements Joyce made in 2013 as hearsay and found no evidence of undue influence. Appellants appealed claiming the trial court erred in excluding Joyce's 2013 statements.

Appellants claim 2013 statements are exceptions to the hearsay requirement as present sense impressions. The appeals court affirmed the exclusion of the statements because they did not reflect decedent's then existing state of mind in 2010. 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 2010 state of mind in excluding appellants as beneficiaries.

The appeals court explained, 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.

TOPIC: Undue influence finding upheld when there is sufficient evidence of susceptibility of the testator and control by defendant.
 TITLE: Yurkovich v. Kessler, 2020-Ohio-4169
 COURT: Court of Appeals of Ohio, Sixth District
 COUNTY: Huron
 DATE: August 21, 2020

A jury returned a verdict in favor of appellees and a finding that Rita's last will and testament is not valid. The probate court entered judgment in accordance with the jury verdict. The court ruled both that at the time the will was executed Rita lacked testamentary capacity and the will was created as a result of Appellant's undue influence.

Appellant appealed claiming the verdict and the decision of the trial court constituted judgments that were against the manifest weight of the evidence. Appellant asserts there was insufficient evidence that Rita lacked testamentary capacity and that Appellant exercised undue influence over Rita.

At trial, there was testimony establishing Rita's deteriorating health, dementia, and paranoid behavior. The appeals court ruled that this testimony failed to establish how dementia impacted Rita's testamentary capacity.

The appeals court did find sufficient evidence of undue influence. Rita's deteriorating health, dementia, and paranoid behavior support the conclusion that Rita was a susceptible testatrix. Evidence showed Appellant began to take control of Rita's financial affairs and had a clear opportunity to influence Rita. Appellant acknowledges she drove Rita to the appointment with her estate planning attorney. The appeals court found the evidence supports the notion that Appellant took an active role in facilitating Rita's changes to her estate plan.

STRUCTURED SETTLEMENTS

TOPIC: Trial court must hold a hearing on an application for approval in advance of transfer of payment rights.
 TITLE: In re O'Dell, 2019-Ohio-3987
 COURT: Court of Appeals of Ohio, Third District
 COUNTY: Hancock
 DATE: September 30, 2019

In 2018, J.G. Wentworth filed an application for approval in advance of payment rights for a settlement with Kendra O'Dell. The application was denied by the trial court. In 2019, J.G. Wentworth again filed an application for approval in advance of payment rights for a settlement with Kendra O'Dell. The trial court set a hearing, then dismissed the case before the hearing on grounds that it "already heard a similar request and denied it." The appeals court reversed and remanded based on R.C. 23223.584(B)(1) which requires a trial court to hold a timely hearing on an application.

POWERS OF ATTORNEY

TOPIC: Relief from judgement appropriate when party signed as POA, not as individual.
 TITLE: Pristine Senior Living v. Mistler, 2020-Ohio-416
 COURT: Court of Appeals of Ohio, Twelfth District
 COUNTY: Butler
 DATE: February 10, 2020

Randall Mistler signed a document as POA on behalf of his mother who had dementia in 2016. The document was an agreement with Pristine Senior Living & Post-Acute Care of Oxford for residential nursing care for his mother Bernadine. The agreement set forth an arbitration clause. After an arbitration to settle a dispute over missed payments, Pristine was awarded almost \$120,000 plus fees against both Mistler and Bernadine jointly and severally. In 2018, Pristine filed an application to confirm the award with the court. In 2019, Mistler filed a Civ.R. 60 (B) motion for relief from judgment arguing that the award against him be vacated because he signed the agreement as POA, not an individual. The trial court granted the relief and Pristine appealed. The appellate court upheld finding no abuse of discretion.