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Advanced Topics in Probate Law

Probate Litigation & Evidence

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PROBATE LITIGATION & EVIDENCE

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Roadmap for Presentation

- PROBATE LITIGATION TOPICS
 - Jurisdiction, Venue and the Parties
- COMMON EVIDENTIARY ISSUES
 - Testamentary Capacity
 - Attorney-Client and Medical Privilege
 - Hearsay

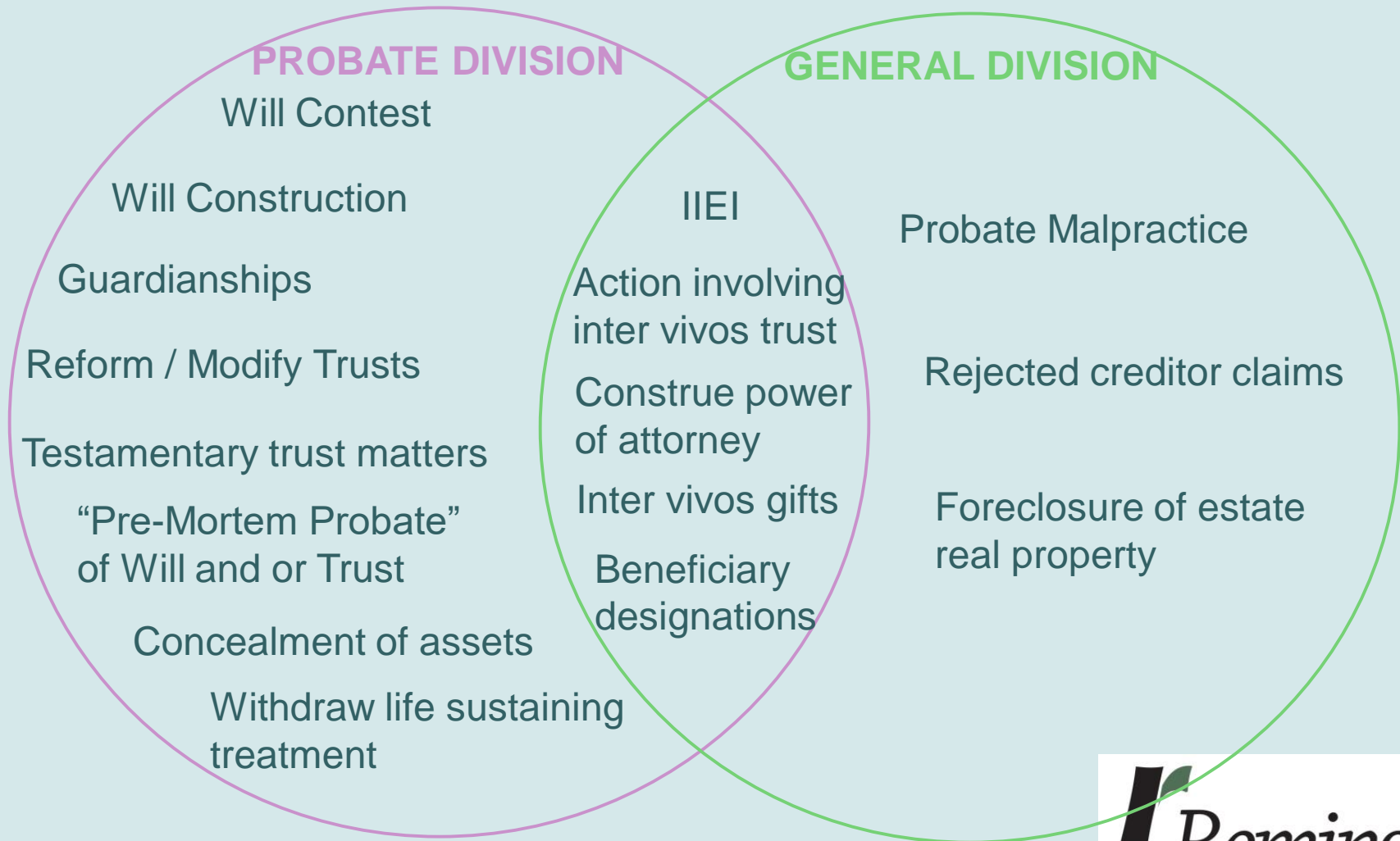
LITIGATION



PROBATE LITIGATION TOPICS

- WILL CONSTRUCTION
- WILL CONTEST
- TRUST CONTEST
- DECLARATORY JUDGMENTS
- INTENTIONAL INTERFERENCE WITH EXPECTANCY OF INHERITANCE
- CONSTRUE POWER OF ATTORNEY
- CONCEALMENT OF ASSETS
- WITHDRAW LIFE SUSTAINING TREATMENT

COMPARISON WITH GENERAL DIVISION



BURDENS OF PROOF

Preponderance	Clear and Convincing
Will Construction	Breach of Fiduciary Duty
Rebut Undue Influence	Proponent of Undue Influence
Will was Revoked by Testator	Admit Lost or Spoliated Will
Testamentary Capacity	Need for Guardianship



TYPES OF EVIDENCE

- Medical Records
- Attorney-Client File
- Eyewitness testimony
- Witness to Will / Trust / POA
 - Notary
 - Familiar with Deceased
- Financial Records
- Beneficiary Designations
 - Signature Cards
 - Check Images

EVIDENTIARY CONSIDERATIONS

- Authentication
 - Knowledge?
 - True and accurate?
 - Custody?
 - Regular course?
 - Notarized?
- Expertise?
 - Lay witness or expert needed?
- Hearsay
 - What is the statement
 - Who is the declarant
- Presentation
 - Direct vs. cross
 - Which witness?
 - Format

TESTAMENTARY CAPACITY

Testamentary capacity exists when the testator has sufficient mind to:

- (1) understand the nature of the business in which he is engaged;
- (2) comprehend generally the nature and extent of the property which constitutes his estate;
- (3) hold in his mind the names and identity of those who have natural claims on his bounty; and
- (4) appreciate his relation to the members of his family.

Niemes v. Niemes (1917), 97 Ohio St. 145, 119 N.E. 503, para. 4 of syllabus

TESTAMENTARY CAPACITY



BUT...

“The law recognizes that a testator whose mind is impaired by disease or otherwise can still have capacity to make a will.”

West v. Knoppenberger (Ohio Cir.Ct.1903), 16 Ohio C.D. 168, 179.

- *A rebuttable presumption* exists that a person under guardianship lacks the testamentary capacity to write a valid will. *Hutchison v. Kaforey*, 2016-Ohio-3541, ¶ 20, 67 N.E.3d 121, 126 (9th Dist.), citing *Taylor v. Garinger*, 30 Ohio App.3d 184, 186 (12th Dist.1986).

TESTAMENTARY CAPACITY

The general rule is that “[t]he mental condition of the testator at the time of making a will determines the testamentary capacity of the testator.” *Oehlke v. Marks*, 2 Ohio App.2d 264, 265-266 (9th Dist.1964), quoting *Kennedy v. Walcutt*, 118 Ohio St. 442 (1928).

- Evidence of the testator’s condition “within a reasonable time before and after the making of the will is admissible as throwing light on his mental condition at the time of the execution of the will in question.” *Kennedy* at 450.
- What constitutes a “reasonable time” depends on the circumstances of the particular case. *Oehlke* at 266.

UNDUE INFLUENCE

- It is well settled that the only evidence relevant to an undue influence claim is that which bears upon the susceptibility of the decedent and whether undue influence was exerted at or around the time the decedent executed the documents at issue.
- What constitutes a reasonable time period is within the Court's discretion.

PRIVILEGE



ATTORNEY-CLIENT PRIVILEGE

2317.02 Privileged communications.

The following persons shall not testify in certain respects:

(A)

(1) An attorney, concerning a communication made to the attorney by a client in that relation or concerning the attorney's advice to a client, except that the attorney may testify by express consent of the client or, if the client is deceased, by the express consent of the surviving spouse or the executor or administrator of the estate of the deceased client. However, if the client voluntarily reveals the substance of attorney-client communications in a nonprivileged context or is deemed by section [2151.421](#) of the Revised Code to have waived any testimonial privilege under this division, the attorney may be compelled to testify on the same subject.

ATTORNEY-CLIENT PRIVILEGE

R.C. 2317.02 (A)(1) privilege applies even after death, except may be waived:

“... if the client is deceased, by the express consent of the **surviving spouse or** **the executor or administrator of the estate** of the deceased client.”

ATTORNEY-CLIENT PRIVILEGE

R.C. 2317.02 (A)(1)(b), the testimonial privilege does **not** apply to:

A **communication** between a client who has since died and the deceased client's attorney ***if***

- the communication is relevant to a dispute between parties who claim through that deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction, **and**
- the dispute addresses *the competency* of the deceased client when the deceased client executed a document that is the basis of the dispute *or whether the deceased client was a victim of fraud, undue influence, or duress* when the deceased client executed a document that is the basis of the dispute.

ATTORNEY-CLIENT PRIVILEGE

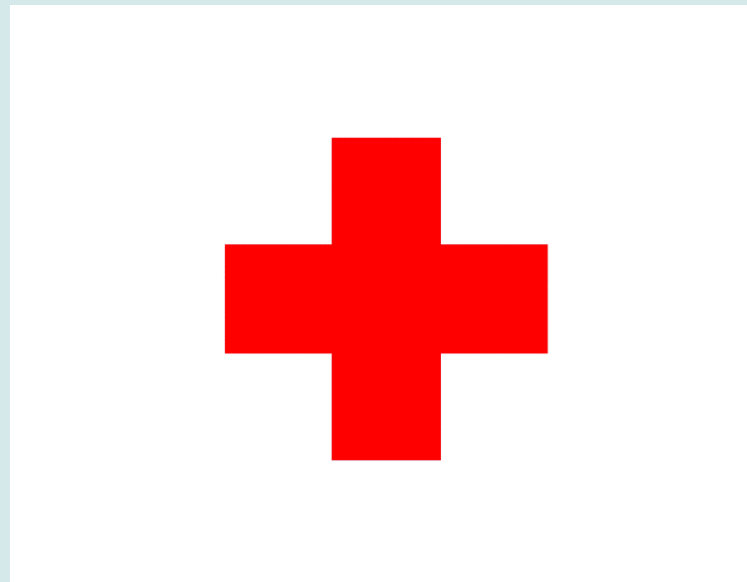
“Testimonial” vs. “Communication” vs. “Document”

Jackson v. Greger, 110 Ohio St. 3d 488, 2006-Ohio-4968, 854 N.E.2d 487 (R.C. 2317.02(A) applies to testimony and documents)

Grace v. Mastruserio, 182 Ohio App.3d 243, 2007-Ohio-3942, 912 N.E.2d 608 (1st Dist.) (statutory attorney-client waiver in R.C. 2317.02(A) applies only to testimonial speech from an attorney, not the documents)

Estate of Hohler v. Hohler, 185 Ohio App. 3d 420, 2009-Ohio-7013, 924 N.E.2d 419, 2009 Ohio App. LEXIS 5878, *22 (7th Dist). (Spouse can waive privilege for testimony and documents under R.C. 2317.02(A) and court can conduct in camera review for relevance/scope)

MEDICAL PROFESSIONAL-PATIENT PRIVILEGE



MEDICAL PROFESSIONAL- PATIENT PRIVILEGE

R.C. 2317.02(B) Testimonial privilege **waived** in any civil action if:

- Consent by patient or legal representative of patient
- If patient is deceased, consent by patient's spouse or executor or administrator
- If claim of medical malpractice or wrongful death

MEDICAL PROFESSIONAL- PATIENT PRIVILEGE

R.C. 2317.02(B)(1)(e)... for deceased patients, privilege does not apply if

- the communication is relevant to a dispute between parties who claim through that deceased patient, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction, **and**
- the dispute addresses the *competency of the deceased patient* when the deceased patient executed a document that is the basis of the dispute *or whether the deceased patient was a victim of fraud, undue influence, or duress* when the deceased patient executed a document that is the basis of the dispute.

MEDICAL PROFESSIONAL- PATIENT PRIVILEGE

R.C. 2317.02(B)(1)(e)(ii)... Even in the **absence** of an express waiver from surviving spouse and or executor/administrator, for deceased patients, when the issue is the **competency** of the deceased and or the deceased's susceptibility to ***duress, fraud or undue influence***

disclosure of medical records and or testimony is “a permitted use” under HIPAA and “an authorization or opportunity to be heard shall not be required.”



MEDICAL PROFESSIONAL- PATIENT PRIVILEGE

BUT... without a waiver



R.C. 2317.02 (A) vs. (B)

Attorney-Client

- R.C. 2317.02(A)
 - “Testimonial”
 - “Communication” is not defined
 - In addition to “common law privilege”

Medical Professional-Patient

- R.C. 2317.02(B)
 - Testimony, diagnostics and documents
 - “Communication” is defined in (B)(5)(a)
 - Intertwined with HIPAA
 - Supersedes common law, if any

HEARSAY



HEARSAY

- Evid.R. 801(C)
- "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

NOT HEARSAY BY DEFINITION

- Hearsay is inapplicable in a proceeding to admit a lost will. *In re Estate of Haynes*, 25 Ohio St. 3d 101, 104, 495 N.E.2d 23, 26, 1986 Ohio LEXIS 702, *9, 25 Ohio B. Rep. 150
- Prior Statement – Evid.R. 801(D)(1)
- Admission by Party Opponent – Evid.R. 801(D)(2)
 - Statements of a decedent are admissible against his or her estate as admissions against a party opponent. *Huth v. Tama Kus*, 2018-Ohio-1931, ¶36, 113 N.E.3d 140, 147, 2018 Ohio App. LEXIS 2067, *14-15, 2018 WL 2230727 (5th Dist).

TWO TYPES OF EXCEPTIONS TO HEARSAY

DECLARANT AVAILABILITY IS IMMATERIAL

- Evid.R. 803
 - Present sense impression
 - Then existing mental, emotional or physical condition
 - Statements for purposes of medical diagnosis or treatment
 - Recorded recollection

DECLARANT IS UNAVAILABLE

- Evid.R. 804
 - “Unavailable” includes death, incompetence or physical illness/infirmity
 - Dying declaration
 - Statement against interest
 - Statement of personal or family history
 - Statement by deceased/incompetent*
 - Forfeiture

HEARSAY EXCEPTIONS

- Evid.R. 804(B)(5) Statement by a deceased or incompetent person.
 - The statement was made by a decedent or a mentally incompetent person, where all of the following apply:
 - (a) the estate or personal representative of the decedent's estate or the guardian or trustee of the incompetent person is a party;
 - (b) the statement was made before the death or the development of the incompetency;
 - (c) the statement is offered to rebut testimony by an adverse party on a matter within the knowledge of the decedent or incompetent person.

HEARSAY EXCEPTIONS



HEARSAY? What say you?

- “Joan told me that I was a beneficiary in her Will.”
- “My aunt Mary told me that she did not trust this guy.”

TAKE AWAY

TESTATOR'S INTENT IS PARAMOUNT

Capacity can be fleeting.

Privilege should not be a (high) hurdle on the path of truth.

Hearsay does not apply in some probate circumstances, and there are exceptions for other circumstances.

THANK YOU

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