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Advanced Topics in Probate Law

Probate Case Law Update

Magistrate Steven S. Elliott

COURTS OF APPEAL/TRIAL COURT OPINIONS

ADOPTION

PATERNITY

TOPIC: **When an unmarried woman gives birth to a child, a father who appears on the birth certificate when he has voluntarily acknowledged paternity in writing cannot also claim to be a putative father.**

TITLE: **In re Adoption of B.G.F., 2018-Ohio-5063**
COURT: **Court of Appeals, Third District**
COUNTY: **Shelby County**
DATE: **December 17, 2018**

Mother and Father lived together when B.G.F. was born in Indiana in 2014. In 2017, Mother married Step-father in Ohio. Step-father filed a Petition for Adoption alleging Father's consent to the adoption was not required because he failed without justifiable cause to provide more than de minimis contact with B.G.F. or provide support and maintenance for the child for a period of at least one year immediately preceding the filing of the adoption petition. The trial court found that Father's consent was not required for the adoption.

On appeal, Father argued inter alia that the trial court erred in failing to apply the consent requirements of R.C. 3107.07(B). Although Father was the natural Father of B.G.F., he argued that he was the "putative father." As the putative father, the evidentiary standard for whether Father's consent is needed is different under R.C. 3107.07(B).

The Court of Appeals held that he was not the "putative father" because his name was on the child's birth certificate and the child was given Father's last name. Under Ohio law when an unmarried woman gives birth to a child, the father's name appears on the birth certificate only when he has voluntarily acknowledged paternity in writing. In Indiana, a man's execution of a paternity affidavit conclusively establishes that the man is the child's natural father, without any further judicial ratification through a court proceeding.

R.C. 3107.07(A) requires consent of the natural parent unless there was a failure without justifiable cause to provide *either* more than de minimis contact with the minor or maintenance and support for the one-year time period prior to the adoption. If a probate court makes a finding that the parent failed to support or contact the children, the court proceeds to the second step of the analysis and determines whether justifiable cause for the failure has been proven by clear and convincing evidence.

R. C. 3107.07(B) requires consent of a putative father unless :

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

> **(2)** The court finds, after proper service of notice and hearing, that any of the following are the case:
>
> **(a)** The putative father is not the father of the minor;
>
> **(b)** The putative father has willfully abandoned or failed to care for and support the minor;
>
> **(c)** The putative father has willfully abandoned the mother of the minor during her pregnancy and up to the time of her surrender of the minor, or the minor's placement in the home of the petitioner, whichever occurs first.

The probate court held that Step-Father proved no contact. Maternal Grandparents, who resided next door to Mother and B.G.F., remained willing to host Father at his convenience so that he could build a relationship with B.G.F., which Father chose not to do. The Father claimed he paid for gifts given to the child by the Paternal Grandmother. However, de minimis monetary gifts from a biological parent to a minor child do not constitute maintenance and support, because they are not payments as required by law or judicial decree as R.C. 3107.07(A) requires. The Father never filed for custody rights or made support payments for the child.

CONTACT BY PARENT

TOPIC: **The trial court must consider all of the domestic relations court evidence and the issue of justifiable cause for a father's failure to communicate when determining whether a father's consent is required for the adoption of his child by a stepfather.**

TITLE: **In re M.G.B.-E., 2019-Ohio-753 (On remand from Ohio Supreme Court)**
COURT: **Court of Appeals of Ohio, Twelfth District**
COUNTY: **Clinton County**
DATE: **March 4, 2019**

Father and Mother divorced in 2004. The domestic relations court awarded Mother custody of their two children and Father visitation rights. Mother stopped allowing visitation and made allegations of abuse against Father and his relatives. The domestic relations court issued an order for Father's parenting time to resume after the Father and children engaged in therapy to help the children transition back to spending time with their father. Father did not participate in counseling and his visitation time did not resume. Mother changed the children's last names, moved several times, and remarried.

Father filed a motion to reestablish parenting time on May 14, 2015. Shortly after, Stepfather filed a petition to adopt the children and claimed Father's consent was not necessary because Father had failed, without justifiable cause, to have more than de minimis contact with the children in the year preceding the petition to adopt per R.C. 3107.07.

The probate court found that Father's consent was not required for the adoption and the court of appeals affirmed. However, the Ohio Supreme Court held the probate court had erred in

failing to consider the Father's pending parenting proceedings in domestic relations court and remanded the case for the probate court to consider those proceedings in determining whether the Father failed to have contact with his children.

On remand, the probate court determined that it should only consider domestic relations court filings up to the date of the original hearing on the adoption petition. The probate court further stated that it had considered those domestic relations court's filings and had again determined that Father's consent to the adoption was not required.

The Court of Appeals reversed finding probate court erred in finding no consent requirement without considering all the relevant domestic relations court evidence *as of the time of the remand hearing*. The probate court was not restricted to considering only evidence arising during the one-year look-back period under the statute. There was no indication that the probate court considered whether the mother interfered with or impeded the father's attempts to communicate with the children.

TOPIC: **The fact that police forced Father to leave Mother's property during a visit is not a justifiable cause for not contacting his children during the one-year look back period.**

TITLE: **<u>In re Adoption of L.L.L.,</u> 2018-Ohio-4556**
COURT: **Court of Appeals, Twelfth District**
COUNTY: **Preble County**
DATE: **November 13, 2018**

Mother was residential and custodial parent of the couple's two children when they divorced in 2012. Father was given visitation rights, which were to be supervised and scheduled between the parties. Father visited his children several times after the divorce, but missed scheduled visitations, was late, and police were called during the last visit. Father was under the impression that he was not allowed back on the Mother's property.

Mother remarried in July 2015. The children's Stepfather filed petitions for adoption in November 2017. At the consent hearing, Father admitted that he had not seen the children in several years. He claimed he had tried to send them cards and letters, and had also attempted to contact the mother through family and friends. The Mother and Stepfather both testified that there was no contact at all from the Father. Mother testified that she lived at the same address from 2011 until 2016 and worked at the same job since the time visitation ended.

The trial court held that Father's consent to the adoption was not required because he had failed without justifiable cause to provide more than de minimis contact. Father appealed, claiming the probate court erred by: 1) continuing the consent hearing without Father's attorney present and 2) finding Father had no justifiable cause for failing to see his children.

The Court of Appeals upheld the probate court's decision. There was no evidence in the record that Father's attorney was supposed to attend the hearing, or that Father requested a

continuance. Father's due process rights were not violated because he participated in the hearing, testified on his own behalf and cross-examined the Mother and Stepfather.

Father argued that the court could not review Mother's testimony because she was not properly sworn in during the hearing. The court found this to be incorrect, based on the record. During the hearing, the court discussed that all three persons present would be testifying and had them all swear in together. Although Mother's affirmative answer to the swearing in was not audible on the transcript, there was no indication that she was not properly sworn in.

Finally, Father argued the evidence of his failure to visit with the children was not clear and convincing. He claimed that because the police were called during his last visit and he was told not to come back, he had no opportunity to visit the children. However, the Court held that this did not foreclose all of his opportunities to see the children. He could have filed a motion for visitation and requested that the court order some other method of visitation. He also could have called the children, sent cards, or engaged in other communication. The court deferred to the trial judge's determination of credibility of the witnesses.

TOPIC: **A judgment entry of the juvenile court suspending appellant's contact with the child until further order of the court provided justification for appellant's failure to contact the child.**

TITLE: **<u>In re Adoption of B.V.K.M.,</u> 2019-Ohio-1173**
COURT: **Court of Appeals, Sixth District**
COUNTY: **Lucas County**
DATE: **March 29, 2019**

Father had visitation rights and a judicial decree of zero child support. On July 13, 2016, the Father lost his visitation rights until further order of the court because of mental health and substance abuse issues. Stepfather filed to adopt the child on October 6, 2017. Stepfather alleged Father's consent was not required because Father failed without justifiable cause to provide more than de minimis contact with the child and failed to provide for the maintenance and support of the child for at least a year before the adoption petition was filed. On October 10, 2017, Father filed a motion to modify with the juvenile court, seeking supervised visits with the child.

The probate court found that the zero support order obviated the maintenance and support issue. However, the court also held that Father failed without justifiable cause to have more than de minimis contact with the child for the year before the adoption petition was filed. Therefore, Father's consent was not required. Father appealed.

The Court of Appeals reversed, finding that the judgment entry of the juvenile court suspending appellant's contact with the child until further order of the court provided justification for appellant's failure to contact the child.

TOPIC: **Father's ignorance of the legal impact of the protection order that he and his counsel had signed did not provide justification for his failure to contact the children.**

TITLE: **In re J.L., 2019-Ohio-366**
COURT: **Court of Appeals, First District**
COUNTY: **Hamilton County**
DATE: **February 6, 2019**

Father and Mother had two children and divorced in 2013. Father did not participate in the divorce proceedings. The divorce decree designated Mother as the residential parent and the legal custodian of the children. It noted that since Father had not attended the court-mandated parenting class, the domestic relations court declined to issue any specific parenting-time orders. Therefore, Father's visits with the children were at Mother's discretion.

From 2013 to 2016, Father visited the children three or four times a year. In June 2016, Father and his girlfriend took the children for a two-week vacation, which consisted of visits to the girlfriend's and Father's parents' homes. The vacation ended early, after an alcohol related argument between the Father and girlfriend.

In August 2016, Father's now former girlfriend told Mother that Father made serious threats against the children, Mother, and Stepfather. Mother sought and received an order of protection from the domestic relations court. On September 27, 2016, Father entered a Consent Agreement and Domestic Violence Civil Protection Order. The terms of the consent agreement required Father to refrain from any contact with Mother and Stepfather for five-years. The order did not identify the children as parties and the section concerning Father's parental rights and visitation was left blank.

One year after the order of protection, Stepfather petioned to adopt the children. He alleged that Father had not supported or contacted his children in the prior year and thus his consent was not required. Father, Mother, Stepfather, the children's paternal grandmother, and Father's former girlfriend testified at the February 2018 consent hearing.

Father admitted that he had last seen his children in July 2016, and that he had last texted the older child in August 2016. Father admitted knowing, during the entire period at issue, where Mother and the children lived.

Father denied threatening Mother or her family. He stated that he had signed the consent agreement on the advice of his attorney. Although it did not list the children as protected parties, Father testified that he thought that any contact with the children would violate the order. He acknowledged that he had no contact with the children during the one-year look back period.

The magistrate concluded that it was "uncontroverted" that Father had no contact with the children since the beginning of the look-back period. She noted that the initial ex parte order had identified the children as protected parties, thus proscribing contact with them. However, this was only for approximately 40 days. During the period of the consent agreement, Father did not

visit the children or send cards or letters. While father had the email address of the older child, he sent no emails during the period. Father took no steps to complete the domestic relations court's parenting class and had not filed post-decree motions seeking modification of the custody or parenting-time orders. Father's ignorance of the legal impact of the protection order did not justify his failure to contact the children.

The trial court affirmed and Father appealed, claiming error in determining that Father's consent for adoption was not required when he had been prohibited from contacting the children during the ex parte order-of-protection period.

The Court of Appeals found the probate court's conclusion that father Failed to have any contact, much less de minimis contact, with his children during the look-back period was amply supported in the record. The ex parte protection period was only 11% of the look back period. Father willingly signed the consent agreement and his claimed ignorance of the legal impact of the agreement did not relieve him from his obligation to contact his children.

TOPIC: The fact that a father was in prison during the one-year look back period for is not justifiable cause for not contacting his children.

TITLE: <u>In re Adoption of A.C.M.C.,</u> 2019-Ohio-879
COURT: Court of Appeals, Seventh District
COUNTY: Belmont County
DATE: March 13, 2019

Father was in prison for multiple offenses involving the sexual abuse of Mother's daughter from a previous relationship, at the time of A.C.M.C.'s birth in 2010. Father and Mother divorced in 2011. The divorce decree stated that Father had to petition the court for visitation of A.C.M.C., which he never did. Father was released from prison in May 2018.

Mother married Stepfather in September 2013. In March 2018, Stepfather filed a petition to adopt A.C.M.C. Father contested the adoption. The Belmont County Probate Court found that Father's consent to the adoption was not necessary because he failed, without justifiable cause, to provide more than de minimis contact with A.C.M.C. during the year preceding the adoption petition. Father appealed.

The Court of Appeals upheld the probate court's decision. The fact that Father was in prison was not construed as justifiable cause for no contact. Father had no contact whatsoever with A.C.M.C. during her entire life. Although he was in prison, he did have contact with his other daughter. He sent her cards, letters, and gifts and contacted her by phone. Father never attempted any similar communication with A.C.M.C. and did not contact Mother. Father claimed that he did not have Mother's contact information. However, her phone number and grandmother's address were available to Father on the divorce decree. Father also claimed that he was not allowed to contact his victim, Mother's older daughter, which prevented him from calling Mother's home. The court also discredited this excuse because the older daughter only lived with Mother half of each week.

MAINTENANCE AND SUPPORT OF CHILD

TOPIC: **A court must consider evidence of the paternal grandparents' involvement when determining whether a father's consent to adoption is required based on his failure to provide maintenance or support for the child during the one-year look-back period when the DR order substitutes grandparents for father for visitation.**

TITLE: **In re Adoption of A.V.H., 2019-Ohio-369**
COURT: **Court of Appeals, Ninth District**
COUNTY: **Summit County**
DATE: **February 6, 2019**

Father and Mother were divorced in September 2015. Father was granted companionship time and was ordered to pay $50 per month in child support. The divorce decree provided that if Father was "unavailable or absent from the Akron area his parents shall have companionship time with [A.V.H.] in his place."

Father was incarcerated on a felony conviction two months after the divorce. His parents ("Grandparents") took over his companionship time with A.V.H. during his incarceration. They provided for all of her needs during her regular companionship time at their home, including food, clothing, toys, entertainment, and childcare. During the one-year look-back period, A.V.H. spent at least 93 days with her Grandparents. Father only paid $12.23 in child support during the one-year look-back period.

Stepfather filed a petition to adopt A.V.H. on February 14, 2017. He alleged that Father's consent was not required because Father had failed without justifiable cause to communicate with or provide for the maintenance and support of the child for at least one-year immediately preceding the filing of the petition, as required under R.C. 3107.07.

Father appealed the judgment of the Summit County Court of Common Pleas, Probate Division. The Court of appeals reversed. The trial court focused on the $12.23 child support payment during the look back period and the fact that Father was receiving money in prison, but not paying support. It did not consider any contribution made by the Grandparents during this time.

The Court of Appeals, held that the support given by the Grandparents must be considered in evaluating whether Father had failed to provide for the maintenance and support of the child for at least one-year immediately preceding the adoption petition.

The case is pending with the Ohio Supreme Court

TOPIC: **A natural father does not have a duty to provide child support separate from a judicial decree of support.**

TITLE: **In Re Adoption of B.I., 2017-Ohio-9116**
COURT: **Court of Appeals of Ohio, First District**
COUNTY: **Hamilton County**
DATE: **December 20, 2017**

Father was incarcerated in 2009. During his incarceration, Father and Paternal Grandmother repeatedly requested that Mother terminate the Father's child-support order. Unless the child support order was terminated, Father would be incarcerated again on child-support arrearages upon release from prison. Mother agreed to an order that set Father's support obligation and arrearage at zero. Mother never requested any support nor did Father offer any support during the one-year look-back period.

Stepfather filed a petition to adopt his stepson. The Court of Common Pleas, Hamilton County, Probate Division dismissed the petition. The Probate Court held that the Father's consent to the adoption was required because Stepfather had not proven that Father failed to meet the requirements of R.C. 3107.07(A). The Stepfather appealed.

The Court held that where a court has ordered a parent to pay no child support or zero child support, that court order of support supersedes any other duty of support required by law. A parent cannot fail without justifiable cause to provide maintenance and support for the child when there is no child support payment required.

The Court of Appeals affirmed the Probate Court dismissing the Stepfather's adoption petition.

This case is pending with the Supreme Court of Ohio.

RIGHT TO COUNSEL

TOPIC: **There is no presumption of a right to counsel in private adoption cases because the parent will not lose his/her personal freedom of physical liberty if he/she is unsuccessful and there is no state action**.

TITLE: **In re Adoption of M.M.F., 2019-Ohio-448**
In re Adoption of Y.E.F., 2019-Ohio-449
COURT: **Court of Appeals, 5th District**
COUNTY: **Delaware County**
DATE: **February 8, 2019**

In September 2016, the trial court awarded Appellees legal custody of twin children and granted biological parents parenting time. On April 4, 2018, Appellees filed a petition for adoption alleging that consent of the biological parents was not required because the parents had each failed, without justifiable cause, to provide more than de minimis contact with the children

or had failed to provide for the maintenance and support of the children for at least one year prior to the adoption petition.

Appellant, the biological mother, filed an affidavit of indigency and a request for appointment of counsel. She requested an attorney because her household gross income is below the federal poverty level and she needed assistance to understand the court procedures, rules of evidence, legal issues, and possible defenses. She included in her motion a 2006 decision by the Franklin County Probate Court finding indigent parents in contested adoption cases are entitled to appointed counsel.

The trial court denied Appellant's request for appointment of counsel. The court found that the case law cited by Appellant was not mandatory authority in this case.

The Court of Appeals held that there are no due process or equal protection violations in a privately initiated adoption proceeding because there is no state action. The Ohio Supreme Court has held that Chapter 3107 of the Revised Code, containing procedures for adoption cases, adequately protects biological parents' constitutionally protected rights. There is no presumption of a right to counsel in adoption cases because the parent will not lose his/her person freedom of physical liberty if he/she is unsuccessful.

TOPIC: **An indigent parent does not have a constitutional due process right to appointed counsel in a private adoption hearing.**

TITLE: **<u>In re L.C.C.,</u> 2018-Ohio-4617**
COURT: **Court of Appeals, Tenth District**
COUNTY: **Franklin County**
DATE: **November 15, 2018**

Mother gave birth on December 12, 2012. In January, 2013, Franklin County Children Services ("FCCS") learned that appellant had tested positive for oxycodone on seven occasions during her pregnancy, twice for marijuana and that she continued to use illegal drugs while breastfeeding. Father's identity was unknown.

On February 25, 2013, FCCS filed a neglect and dependency complaint, pursuant to R.C. 2151.03(A)(2) and 2151.04(C), in the Franklin County Juvenile Court. On May 3, 2013, the child was placed with Appellee and her husband. Appellee is Mother's maternal aunt. The child has lived with Appellee ever since.

Mother traveled to Florida to enter a drug treatment program. She returned briefly in February 2014 for a hearing in the juvenile court case for custody of the child. On October 7, 2014, the juvenile court issued an order, pursuant to R.C. 2151.42(B), awarding legal custody of L.C.C. to Appellee and Appellee's husband. Mother did not object, and went back to Florida. She admitted that she did not complete the Florida drug treatment program and continued to use illegal drugs. In December 2015, a Franklin County Grand Jury indicted Mother for heroin possession, a felony of the third degree.

On July 27, 2016, Appellee filed her petition for adoption, pursuant to R.C. 3107.05, in the Franklin County Probate Court. Appellant received notice of the petition while at the Franklin County jail. Mother filed her *pro se* objection on November 10, 2016. On receipt of appellant's objection, the probate court sent Mother a letter advising her to speak with an attorney regarding her parental rights.

The magistrate found by clear and convincing evidence that Mother failed without justifiable cause to provide more than de minimis maintenance and support to the child for a period of one year immediately preceding the filing of the adoption petition. The magistrate recommended that Mother's consent to the adoption was not required, but also found that it was not in the best interest of the child to grant the adoption petition. Appellee filed objections to the magistrate's decision. Mother filed a response and her own supplemental objections.

At the hearing on the objections, the court questioned Mother about her lack of counsel. Mother claimed that she had attempted to find counsel but could not. The court granted her an additional 60 days to find counsel and prepare for the hearing.

The trial court sustained Appellee's objection to the magistrate's decision and granted the petition for adoption. The court reviewed the relevant factors outlined in R.C. 3107.161(B) for the best-interest determination. The trial court found that appellee had proven by clear and convincing evidence that the adoption was in the best interest of the child.

Mother appealed, asserting the trial court erred in not providing her with counsel. She claimed her constitutional equal protection and due process rights required that the trial court provide her with the assistance of counsel during the adoption proceedings that terminated her parental rights. She asserted the trial court committed structural error by denying her constitutional right to counsel. Additionally, she claimed the trial court committed plain error by finding that her consent was not required in the adoption proceedings and that the trial court abused its discretion by granting the adoption to Appellee.

The Court of Appeals dismissed all of Mother's assignments of error. The different treatment among indigent parents in private adoption proceedings and in state-initiated parental rights termination proceedings does not violate equal protection principles. The trial court did not deprive the mother of a constitutional due process right to appointed counsel in adoption proceeding, because no such right existed. The trial court gave the mother every opportunity to obtain counsel, including granting continuances. The Court noted that although the Ohio Supreme Court has recognized structural error occurs when an indigent defendant is completely denied legal counsel in a criminal case, no court has recognized structural error arising out of the alleged denial of counsel in a civil action. Finally, the Court upheld the probate court's finding that adoption by Appellee was in the best interest of the child.

PROCEDURE

TOPIC: **A request for a reasonable continuance should be granted when an attorney only gains access to the file the day of the consent hearing.**

TITLE: **In re Adoption of A.R.M.R., 2019-Ohio-253**
COURT: **Court of Appeals, Eighth District**
COUNTY: **Cuyahoga County**
DATE: **January 24, 2019**

Mother appealed the probate court's determination that the adoption of her minor child by the stepmother did not require her consent because she failed to support the child without justifiable cause for the one-year preceding the adoption petition.

Stepmother filed a petition to adopt child on November 21, 2017. Mother was subject to an order of the juvenile court that required her to pay $95 per month, plus a two percent processing fee, in child support. The Cuyahoga County Child Support Enforcement Agency (CSEA) provided a certified copy of Mother's child support history. The report indicated that she had not made any child support payments from November 1, 2016 to November 14, 2017.

Mother was employed until November 30, 2016, when she voluntarily quit her job because she began attending school to become a dental assistant. During the next year, she claimed to have applied for "ten to six jobs a day" (sic) but could not find employment. She graduated from the dental assistant program in July 2017 but did not start working until November 2017. At the time of the hearing, Mother was working three part-time jobs – at a snack bar in a bowling alley, at a McDonald's, and as a dental assistant. Mother owed approximately $1,360.91 in outstanding child support.

The hearing was originally scheduled for January 4, 2018 and Mother appeared *pro se*. The trial court granted her leave to file written objections, which she submitted the same day. The next day, the court sent Mother notice of the new hearing on February 12, 2018. On January 22, 2018, Mother contacted counsel to represent her in connection with the adoption petition. At the February hearing, Mother's counsel requested a reasonable continuance. Counsel said that she had just gained access to the file and was under the impression that the hearing was "just a pretrial hearing." The court denied the motion for a continuance because Mother had already been granted a continuance and the hearing was clearly not a pretrial.

Mother appealed the trial court's decision that she had failed without justifiable cause to meet her child support obligations. Mother argued that the trial court abused its discretion in denying her request for a continuance because she had no opportunity to review the CSEA file and her counsel was not given the opportunity to prepare and conduct meaningful discovery.

The Court of Appeals held that the trial court's denial of the motion for continuance effectively prevented Mother from having a reasonable opportunity to satisfy her burden of proof for her justification in not paying child support. Because Mother's counsel had not received the file prior to the hearing, Mother had to defend her right to have a continued relationship with her

child without counsel's full understanding of the situation and evidence to support her position. Mother did not present any evidence of her attempts to find employment during the year prior to the adoption proceeding. Mother's only evidence of her justifiable cause was her own testimony, which was impeached by the absence of corroborating evidence. Counsel's misunderstanding of the nature of the proceeding and delay accessing the file should not result in the termination of Mother's fundamental parenting rights.

TOPIC: **A fraudulent affidavit will not be considered as evidence for an objection to a magistrate's decision.**

TITLE: **In re adoption of N.D.D., 2019-Ohio-727**
COURT: **Court of Appeals, Tenth District**
COUNTY: **Franklin County**
DATE: **February 28, 2019**

Father and Mother had one child, a son, in 2008. Mother had a daughter from a previous relationship. Father was found guilty of molesting and raping the Mother's daughter, and sentenced to prison. He is currently incarcerated. Father has not seen his child since he was two-years old. Child does not have a relationship with the Father's family members.

Mother married Stepfather in 2013. The Stepfather petitioned the court for adoption 2014, alleging Father's consent is not required under R.C. 3107.07(A).

After two decisions on appeal having firmly settled that adoption proceedings did not require Father's consent, the matter was again before the probate court. On December 5, 2017, the magistrate held a hearing on the issue of the best interests of the minor child. On March 15, 2018, the magistrate found that it was in the child's best interest for the stepparent adoption.

Father attempted to present objections to the magistrate's decision in the form of an affidavit. Father signed the objections dated March 29, 2018. The proof of service on the document was also dated March 29, 2018. However, the notary seal, acknowledging appellant's signature on the affidavit was dated November 2, 2017. The probate court concluded that Father's objections in their entirety could not be considered as affidavit evidence. The court stated it would consider appellant's filing as an objection, but could not treat the document as a properly sworn affidavit due to the fraudulent affidavit notarization. The court limited its review to whether the magistrate properly applied the law to the facts of the case.

The probate court adopted the magistrate's findings for the best interest of the child. The court noted that Father refused "to acknowledge the relationship of his victim to the minor and the minor's mother, and the convictions that led to his incarceration as being significant factors in the current state of the non-relationship with his son."

On Appeal, Father asserted that the trial court violated his due process by failing to review de novo appellant's factual objections to the magistrate's decision under Civ.R. 53(D)(3)(b)(iii). Father challenged the court's final decision to grant the adoption petition.

The Court of Appeals upheld the trial court's decision. Father had notice of the hearings and was given meaningful opportunities to be heard. The affidavit was properly excluded as evidence because it was fraudulent.

CLAIMS AGAINST AN ESTATE

TOPIC: **Executors and administers of estates are not considered creditors for purposes of R.C. 2117.06. The time period for executors and administers to file claims against an estate is three months from the date of appointment as an executor or administrator, rather than six months from the date of death.**

TITLE: **In re Estate of Curc, 2019-Ohio-416**
COURT: **Court of Appeals, Eleventh District**
COUNTY: **Trumbull County**
DATE: **February 8, 2019**

Joseph Curc, Jr. died testate on June 25, 1987. Thirty years later, on July 19, 2017, Raymond Curc filed an Application to Probate Will in the Trumbull County Probate Court. He was appointed executor of the estate of Joseph Curc. In November 2017, Raymond filed a Fiduciary's Claim against Estate for approximately $45,000 in expenses for Joseph's funeral, as well as the ½ interest in the real estate taxes, electric services, and gas service that had accrued since his death in 1987 for the property where Agnes Curc (Raymond's mother) continued to live.

The magistrate issued a decision denying the claim, finding the claim was not timely filed as required by R.C. 2117.06. The Probate Court adopted the magistrate's decision. Raymond filed an objection to the magistrate's decision, but the trial court affirmed the magistrate.

The Court of Appeals reversed and remanded. The Court distinguished between a creditor and an executor for filing claims against an estate. R.C. 2117.02 governs claims by executor and administrators, allowing claims to be presented within three months *after the date of appointment* (emphasis added). R.C. 2117.06 limits creditor's claims against an estate to six months *after the date of the death* of the decedent (emphasis added). Raymond filed his claims 54 days after his appointment as executor of the estate. Therefore, his claims are not time barred.

TOPIC: **A plaintiff must file a complaint against an estate within six months after the defendant's death under R.C. 2117.06(C).**

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

The plaintiff filed a complaint against Charles Knight alleging numerous torts in January, 2017. On March 1, 2017, the clerk of courts issued a failure of service notice. Plaintiff took no further action; Knight died on October 12, 2017.

In January, 2018, the plaintiff requested the trial court substitute the estate as the defendant. The clerk of courts issued certified mail service on the estate on January 30, 2018 and filed a failure of service notice on April 6, 2018. On April 19, 2018, the plaintiff requested ordinary mail service on the estate. The clerk of courts filed proof of service by ordinary mail.

The estate filed a motion to dismiss for failure to state a claim, including the failure to serve the complaint on the estate within the required six-month period in R.C. 2117.06(C). The court found that the claim was time barred because it was not filed within six-months of Knight's death. The Court of Appeals held that the requirements of R.C. 2117.06 are mandatory and must be strictly construed.

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

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

On August 31, 2017, Shepherd of the Valley filed a Complaint in the Trumbull County Court of Common Pleas against Richard Cesta, Executor of the Estate of Rose Cesta. The complaint asserted that at the time of Rose Cesta's death on May 15, 2016, she was indebted to Shepherd of the Valley in the principal amount of $24,867. On January 18, 2018, Cesta filed a Motion for Summary Judgment.

The trial court granted Summary Judgment because the claim was untimely. Under R.C. 2117.06(C), Shepherd of the Valley was required to file the claim within six months of Rose's death.

Shepherd of the Valley appealed, arguing that the claim was timely because the special administrator was not actually appointed within 6 months of the death. When a special administrator's appointment is not granted until after the six months has passed, a creditor loses a property interest without due process of law, in violation of the Due Process Clause of the Fourteenth Amendment and Article I, Section 16 of the Ohio Constitution. Appellants also claimed the result is not compelled by existing case law, favors unequitable gamesmanship, and undermines the legislative purpose behind R.C. 2117.06.

The Court found that Shepherd of the Valley did not act with due diligence to comply with the procedural requirements under R.C. 2117.06. The Supreme Court has "invoked a literal

reading of R.C. 2117.06" with respect to the "mandate upon claimants as to the means of presentation." A claim against an estate must be timely presented in writing to the executor or administrator of the estate per § 2117.06(A)(1)(a). Substantial compliance is not permitted.

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

The Court dismissed the Due Process Clause of the Fourteenth Amendment claim because R.C. 2117.06 has been described as a "self-executing" non-claim statute to which the due process requirements do not apply.

TOPIC: The Ohio Department of Medicaid can record a lien against property owned by a decedent for recovery of benefits paid on behalf of decedent during her lifetime. The claim represented by the lien should be paid prior to a nursing home's claim against the estate

TITLE: Wiesenmayer v. Vaspory, 2019-Ohio-1805
COURT: Court of Appeals, Second District
COUNTY: Montgomery County
DATE: May 10, 2019

Margaret S. Edwards moved into Brookhaven Nursing and Rehabilitation Center ("BNRC") on October 15, 2014 and stayed there until her death on January 3, 2016. She did not have spouse or children, nor did she leave a will. Her estate included a parcel of real property in Harrison Township.

Edwards received Medicaid benefits during the last five months of her life. The Ohio Department of Medicaid ("ODM") recorded a lien against Edwards's real property in Harrison Township pursuant to R.C. 5162.21, the statutory mandate for Ohio's Medicaid Estate Recovery Program.

The probate court appointed a special administrator of Edwards's estate. BNRC presented a claim against the estate for $40,750.96. ODM presented a claim against the estate in the amount of $27,018.32.

The probate court authorized the sale of the real property to pay the debts. On August 10, 2017, the probate court confirmed the sale of the real property. The probate court next held that ODM had a valid, statutory lien on decedent's real property, and that the claim against her estate represented by the lien should be paid prior to BNRC's claim.

Appellants claimed that the probate court erred in granting ODM a valid interest in the property. They argued that ODM never perfected its lien against Edwards's real property because it did not record the lien before Edwards died.

The Court of Appeals held that R.C. 5162.21(A)-(B) and 5162.211(A)-(C) authorize ODM to record a lien against the real property of a permanently institutionalized Medicaid recipient after the recipient's death. R.C. 5162.211(B)(1) does not apply exclusively to living, permanently institutionalized recipients of Medicaid benefits. Therefore, there was no statutory requirement for ODM to record its lien against Edwards's property before she died. Additionally, Edward's due process rights were not violated by recording the lien after her death because the estate stood in her place.

R.C. 2127.38(C)(1) states that "the remaining proceeds of [the] sale [of property] shall be applied as follows: . . . [2][t]o discharge the claims and debts of the estate in the order provided by law." Although the statute does not specifically refer to Medicaid liens, the Court held that probate court's determination that the language of R.C. 2127.38(B) and R.C. 2127.19 must be interpreted to include Medicaid liens.

ESTATES

TOPIC: **Although minors are entitled to prior notice for appointment of administrators to their mother's estate, the absence of notice is harmless error since minors are not qualified for appointment.**

TITLE: **In re Estate of Hudson, 2018-Ohio-2436**
COURT: **Court of Appeals, Twelfth District**
COUNTY: **Preble County**
DATE: **June 25, 2018**

Mother, Husband and Daughter ("Emerie") were killed in a traffic accident. Mother was survived by two daughters (the "girls") from a prior marriage. At the time of Mother's death, the girls were minors and in the custody of their Father.

The Mother's mother, ("Beverly"), moved to be named administrator of the estates. The Husband's mother, ("Denise") and Beverly later agreed to be co-administrators of Emerie's estate. The probate court then issued letters of authority naming Beverly administrator of Mother's estate and co-administrator of Emerie's estate with Denise.

The Father hired counsel to represent the girls. That counsel filed a motion to vacate the appointment of Beverly and Denise as fiduciaries because the girls never received notice "for the purpose of ascertaining whether they desire to take or renounce administration."

The probate court denied the motion to vacate. The probate court determined the girls were precluded from administering the estates because they are minors, that they had received notice of the appointment of Beverly and Denise as administrators of Melissa's and Emerie's estates, and that their interests were protected because Beverly named both girls in paperwork filed in the estate as next of kin to Mother and Emerie.

The girls appealed. Beverly filed a motion to dismiss the appeal for lack of a final appealable order and lack of standing.

The Court of Appeals noted that the Ohio appellate districts are split as to whether a decision on a motion to vacate the appointment of an estate administrator constitutes a final appealable order. Some districts find that such decisions are not special proceedings as contemplated by R.C. 2505.02, regardless of the reason to vacate an appointment. Others, districts find that the order is final and appealable as a provisional remedy because otherwise it would deny a meaningful remedy to appellant.

Here, the Court of Appeals held that the probate court's denial of the motion to remove would leave the girls no effective or meaningful remedy following the final resolution of the estate because Beverly's and Denise's duties, as co-executors, would terminate once the estate is administered. Thus, the probate court's judgment entry denying the girls' motion for removal was considered a final appealable order.

Additionally, Denise and Beverly claimed the girls did not have standing because they are minors. According to Civ.R. 17, minors lack standing to bring suit. However, Civ.R. 17(B) provides, "a guardian or other like fiduciary. . . may sue or defend on behalf of the minor or incompetent person." The girls had standing because their father, as parent and natural guardian, hired the attorney to represent the girls. The trial court, in further protection of the girls' interests, appointed a Guardian ad Litem. The Court held the girls were fully represented and had standing to challenge the appointment of these fiduciaries.

The Court recognized that the girls were entitled to notice before the probate court issued Denise's and Beverly's letters of authority. However, the Court held the probate court's failure to issue the notice was harmless error.

If the girls had proper notice, they only would have been entitled to challenge Beverly and Denise as being unsuitable fiduciaries. As minors, they were not qualified to seek appointment themselves. The girls never asserted that Beverly or Denise were improper only that they were not notified. Additionally, the probate court appointed a guardian ad litem to assist in protecting the girls' interests. The Court held that although the girls were not notified of the appointments until after they were made, the girl's interests were fully protected.

TOPIC: **An executor of an estate who has fraudulently conveyed property from the estate should be removed. Requiring her to first provide notice to the court before entering a contract of sale was not a viable alternative to removal.**

TITLE: **In re Estate of Brate, 2019-Ohio-446**
COURT: **Court of Appeals, Twelfth District**
COUNTY: **Warren County**
DATE: **February 11, 2019**

Sherry Walsh, executrix of the estate of Homer Brate ("Sherry"), appealed from the decision of the Warren County Probate Court which found that she fraudulently conveyed the estate's real property and ordered her to return the property to the estate.

Homer Brate died in 2005. The Probate Court appointed Sherry as executrix. The beneficiaries of the estate were Sherry and Nolan Brate ("Nolan"). The primary asset of the estate was a property located in Franklin, Ohio.

In September 2016, the probate court ordered Sherry to sell the property at a public sale. However, without court approval or notice, Sherry signed an executor's deed and transferred the property to two acquaintances, Larry Walsh and Steven Miller. The estate received no cash consideration. Instead, the transfer was intended to pay an untimely claim against the estate by Larry and to repay a personal loan that Steven made to Sherry.

Nolan filed a complaint against Sherry, Larry, and Steven. The complaint alleged that Sherry breached her fiduciary duties in transferring the property and that she converted rent monies from the property. Nolan asked the court to reverse the property transfer and quiet title to the estate, as well as remove Sherry as fiduciary.

The probate court held that the transfer was made with the intent to defraud the only other beneficiary of the estate besides herself and a creditor of the estate. Sherry had transferred the property without notice to the probate court even though it was required by the court order. The court allowed Sherry to continue as executrix with a requirement that she not enter into a contract for the sale of the property without written notice to the other beneficiary and the court.

The Court of Appeals upheld the Probate Court's finding that the property transfer was improper and constituted a fraudulent conveyance under R.C. 1336.04. However, it also held that the probate court abused its discretion in permitting Sherry to continue as fiduciary. Her past actions demonstrated an attitude of indifference to the court and its orders. Requiring her to first provide notice to the court prior to entering a contract of sale was not a viable solution. The Court remanded for the probate court to remove Sherry as fiduciary and appoint a bonded successor fiduciary to finalize the administration of the estate.

TOPIC: The word "cooperate" with Medicaid approval in a nursing home contract does not require an Executor to ensure the Medicaid application will be approved.

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

On October 2, 2017, HCF of Findlay, Inc., d.b.a. Fox Run Manor ("Fox Run Manor") filed a breach-of-contract and quantum-meruit complaint seeking damages from the Executors of the Estate of Anna P. Weber ("Executor"). Fox Run Manor alleged it was owed for services provided to Weber, for her nursing-home care from October 1, 2016 through the date of her death.

In August, 2018, the trial court granted summary judgment in favor of the Executor and dismissed the complaint. Fox Run Manor appealed. Fox Run Manor claimed that the Executor failed "to cooperate with the Medicaid application process as required by the unambiguous definitions contained in [the contract]" because the Executor "never applied to have a Qualified Income Trust [("QIT")] established until after the Medicaid denial was issued."

The Court of Appeals upheld the trial court's findings that there was no breach of contract. The contract was unambiguous. Specifically, the contract stated: "Representative agrees to pay from his/her own resources any unpaid charges due to the Manor as a result of the Representative's failure to *cooperate* in the Medicaid eligibility or redetermination process." (Emphasis added.) The Court concluded the Executor did not fail to cooperate with the Medicaid application process. The Executor was not required to "ensure" Medicaid eligibility, she was just required to "cooperate" with the application process.

Here, the Executor acted promptly to establish Weber's eligibility for Medicaid by applying for Medicaid benefits within the first month after Weber was admitted to Fox Run Manor. The Executor made a full and complete disclosure of Weber's financial resources and income during the Medicaid application process and cooperated fully in providing all requested information.

When the initial application for Medicaid benefits was denied, the Executor cooperated in the redetermination process as specified in the contract. The Executor took the necessary action to appropriately reduce Weber's assets to the allowable limit to be eligible for Medicaid benefits. The Executor established a QIT, which is "a trust that allows an individual whose income is over the special income level (SIL), as described in rule 5160:1-6-03.1 of the Administrative Code, to have some or all of his or her income not be counted when determining Medicaid eligibility by placing income in the trust." Ohio Adm. Code 5160:1-6-03.2(B)(6). The Executor submitted the QIT documents to County Department of Job and Family Services, as required per the contract.

Fox Run Manor was not entitled to summary judgment because there was no genuine issue of material fact that the Executor had attempted to qualify Weber for Medicaid benefits in

accordance with the contract. The Court additionally cautioned Fox Run Manor's "zealous pursuit of damages in breach-of-contract actions where it has broadly drafted its contract by including such terms as 'cooperating,' while minimizing a relatively narrow window-of-time concerning government-benefit determinations

TOPIC: A witness to a "non conforming" will under R.C. 2107.24 may inherit thus protecting a testators intent over formalities.

TITLE: In re Estate of Shaffer, 2019-Ohio-234
COURT: Court of Appeals, Sixth District
COUNTY: Lucas County
DATE: January 25, 2019

Joseph I. Shaffer, died July 20, 2015, at the age of 87. A 1967 will was admitted to probate and a subsequent 2006 will was produced. The 2006 will benefited Juley Norman ("Norman") and her son, Zachary ("Appellant"), who developed a close relationship with Shaffer prior to his death. Norman was Shaffer's "meaningful other." He also had a son, Terry with whom he had established a sleep disorder company.

On December 22, 2006, when Shaffer was approximately 78 years old, he decided to go to the hospital because he was not feeling well. Before leaving, Shaffer asked Appellant to get him some paper, which he used to write the document at issue, signed it, and gave it to Norman. Shaffer then told Appellant to keep the document for his mother. They then went to the hospital, where Shaffer was treated for elevated glucose levels and had a heart cath.

The 2006 document stated as follows:

> Dec 22, 2006/My estate is not/completely settled/All of my Sleep Network/ Stock is to go to/Terry Shaffer./Juley Norman for/her care of me is to/receive 1/4 of my estate/Terry is to be the/executor./This is my will./
>
> /s/ Joseph I Shaffer

During the next few years, Shaffer referred to the "will" on two occasions. According to Norman, Shaffer had a will from 1967 but never updated it after his wife died. She testified the decedent did not like to talk about death and had never probated his wife's estate. She believed that the decedent would not have talked to an attorney about changing his will because it would have raised the issue of probating his wife's estate, which he wanted to avoid.

After Shaffer's death in 2015, Appellant attempted to probate the 2006 will. The court did not allow Appellant to testify or cross examine opposing witnesses because he was pro se. The magistrate found that the will was not properly executed and could not be admitted. The magistrate also noted that 1) the decedent had not referenced his prior will in the 2006 document or to the witnesses, 2) the language of the 2006 document is contradictory because the decedent wrote his estate was not completely settled and yet he devised "all" of his property; 3) the

decedent prepared the document while he was in the midst of a health crisis and may not have been able to form a clear intent; 4) Norman questioned the decedent as to the validity of the document as a will and yet no one at the hospital was asked to witness the 2006 document; 5) the 2006 document did not mention the decedent's other son or indicate how the remainder of the decedent's estate would be distributed.

Finally, the magistrate held that R.C. 2107.24 which governs documents purporting to be wills but which do not comply with the formalities of R.C. 2107.03 including attestation and subscription did not apply R.C. 2107.24 is intended to provide for admission of nonconforming wills due to an inadvertent mistake in execution or unusual circumstances warranting a remedy rather than in cases where the testator was ignorant of the law. The trial court adopted the magistrate's decision.

The right to dispose of property at death is a limited statutory right controlled by law. R.C. 2107.03 and 2107.15 work together to protect a decedent's intent that property distribution follow decedent's wishes and not the laws of descent. A statutorily compliant will must be admitted but can be challenged on other grounds.

Witnesses who are also heirs are competent but subject to "purging" under 2107.15. Purging voids the bequest to a witness but prevents the will as a whole from being declared invalid.

Here the Appeals Court found that R.C. 2107.24 does not require "competent or disinterested witnesses" so the purging statute does not apply to a 2107.24 will. The probate court must still find by clear and convincing evidence that decedent prepared the document and intended it to be a will. Here, the Probate Court should have admitted the will.

TOPIC: **The Court will look at the plain language of the annuity beneficiary designation form to determine beneficiaries. If the language is ambiguous, the Court will look to extrinsic evidence, including the decedent's will to determine intent.**

TITLE: **In re Estate of Harris, 2018-Ohio-3725**
COURT: **Court of Appeals, Seventh District**
COUNTY: **Belmont County**
DATE: **September 13, 2018**

William Harris, Sr. was married to Emily Harris. They had two children: William II and appellant John Harris. Emily also separately had a daughter, appellant Jeri Sanders Mesler.

William Sr. completed an annuity application, designating Emily as his primary beneficiary and William II as the only contingent beneficiary of his annuity. When William Sr. and Emily divorced, William Sr. executed a change in beneficiary form designating Emily as the primary beneficiary "until she dies." He designated William II as the first contingent beneficiary and stated William II "will get 100% of annuity remaining after she [Emily] dies." William Sr.

designated his cousin, Margaret Roberts Van Kirk, as the second contingent beneficiary "if anything remains."

William Sr. died in 2002. Emily received the annuity payments until her death in 2006. William II then received the annuity payments until his death in 2008. After William II's death, Margaret received the annuity payments until her death on November 23, 2016. The annuity had a remaining value of $77,946.90 after Margaret's death.

The Attorney for the appellants indicated that William II was the beneficiary of the annuity and it was necessary to reopen the estate to liquidate that asset. The probate court reopened William II's estate and the $77,946.90 was issued to that estate.

At the request of the Attorney for the appellants, the probate court held a hearing to determine who was entitled to the balance of the annuity. The court found that the balance of the annuity funds was to be paid to Margaret's estate. John Harris and Jeri Sanders Mesler appealed.

The Court of Appeals held that based on the language of the annuity beneficiary form as well as William Sr.'s will, he intended to cut off the inheritance ty his own family after the death of William II. The balance of the annuity passed to William Sr.'s cousins.

TOPIC: **The trial court erred in ruling that the decedent's siblings were not beneficiaries of her investment account because the weight of the evidence demonstrated the clear intent of the decedent was to name the siblings as beneficiaries.**

TITLE: **Murphy v. Hall, 2019-Ohio-188**
COURT: **Court of Appeals, Eleventh District**
COUNTY: **Trumbull County**
DATE: **January 22, 2019**

Six of the siblings ("Appellants") of the decedent filed a complaint against the seventh sibling ("Appellee") seeking a declaration that all seven siblings are the beneficiaries of her Fidelity 403(b) account. They claimed the decedent completed a change of beneficiary form, leaving each of them a 14 percent interest in her 403(b) account. Appellee filed an answer arguing that all the proceeds of the 403(b) account should be paid to The Estate of Catherine M. Murphy, which named Appellee as sole beneficiary. She claimed the change of beneficiary form was not properly executed and did not reflect the decedent's intent.

A friend of the decedent had completed the change of beneficiary form. She testified that she changed the form to include all the siblings as equal beneficiaries because this is what decedent wanted. She testified that she observed the decedent's mental state was "clear" at the time that the decedent signed the form.

The trial court held that proceeds from the 403(b) account should be paid to the estate of the one sibling. The court applied the clearly expressed intent test, finding that the change of

beneficiary form did not reflect the decedent's intent because the friend did not have explicit direction from the decedent." The siblings appealed.

The Court of Appeals reversed, finding the weight of the evidence demonstrated that the beneficiary form revealed the decedent's clearly expressed intent. Although the friend admitted that she may have completed the form incorrectly, she also testified that she completed the form to reflect the decedent's intent. The recorded phone calls between the decedent and Fidelity indicate that she understood that her investment account would pass to her estate if she did not complete a change of beneficiary form.

TOPIC: **The attorney who created a will and is counsel for the executor of the estate can testify to resolve a latent ambiguity in a will when neither party moves to disqualify the testimony during the evidentiary hearing.**

TITLE: **Bogar v. Baker, 2019-Ohio-1762**
COURT: **Court of Appeals, Seventh District**
COUNTY: **Mahoning County**
DATE: **April 29, 2019**

Thomas Bogar died testate. He made two bequests in his will: he left his home and "all contents of said real estate" to his brother ("Appellant") and the remainder of his property to the defendant-appellees. Appellant claimed the contents of the real estate included the farm equipment and vehicles located at the property. The executor claimed the "real estate" only included the contents of the home located on the property.

The attorney who created Bogar's will testified that Bogar did not consider the farm equipment and vehicles to be part of the contents of the real estate. He wanted the farm equipment and vehicles to be part of the residuary for his other beneficiaries.

The probate court awarded Appellant the real estate and the contents of the main house only. All other tangible and intangible personal property, which included the farm equipment, was awarded to the Appellees.

On appeal, Appellant argues that it was inappropriate for the probate court to consider testimony from Bogar's attorney because he was not administered an oath before testifying and he was Appellee's counsel in this matter.

The Court of Appeals held that since Appellant made no objection to the lack of an oath during the hearing, the claim was waived. The Court also noted that as an officer of the court, an attorney is always under oath when speaking to matters within his personal knowledge.

Appellant claimed the attorney's testimony created a conflict of interest because although he created the will, he was representing the executor in this case. The Ohio Supreme Court has held that neither the Ohio nor the Federal Rules of Evidence bar an attorney from testifying on behalf of his own client. Here, the Appellant actually called the attorney to testify at the

evidentiary hearing. Neither party disputed the admissibility of the attorney's testimony and Appellant did not make a motion to disqualify the attorney's testimony.

Appellant also argued that the probate erred in construing the plain language of the will. The probate court used extrinsic evidence to determine the latent ambiguities in the will. Appellant testified that he did not have any conversations with Bogar about how he wanted his property distributed after his death. However, the attorney testified as to Bogar's intent. The Court of Appeals held that the Attorney's testimony resolved the latent ambiguity in the will.

FRIVOLOUS CONDUCT

TOPIC: **A trial court's findings of frivolous conduct will be upheld without proof of abuse of discretion through the review of the transcripts.**

TITLE: **Taneff v. Lipka, 2019-Ohio-887**
COURT: **Court of Appeals, Tenth District**
COUNTY: **Franklin County**
DATE: **March 14, 2019**

An ancillary estate was opened in Ohio for real estate owned by the decedent. One of the decedent's four children, who was also an attorney in Ohio, was appointed as administrator. Two of the other siblings filed for her removal. The probate court appointed a successor administrator. The attorney/heir and another sibling (the "appellants") disagreed with the successor administrator's ("appellee") handling of the sale of the property and attempted to have him removed.

The probate court found that the appellants' arguments to remove appellee as administrator were without credible evidence to suggest he neglected his duty or engaged in any conduct warranting his removal. After much interference with the sale of the property, the probate court held that the attorney/heir willfully violated both Civ. R. 11 and R.C. 2323.51 and that reasonable attorney fees and costs would be assessed to her. The court found that the attorney/heir had willfully drafted, read, and signed numerous baseless pleadings and other documents, which she filed to cause delay. On appeal, the appellant asserted 12 assignments of error, all of which the Court of Appeals overruled.

The Court of appeals held that it lacked jurisdiction to consider the attorney's challenge to removal and substitution rulings because the appeal was untimely under App.R. 3. A notice of appeal, which must designate the judgment, order, or part thereof appealed from, must be filed within 30 days of a judgment of the trial court.

Appellant also failed to demonstrate the order was void. She did not properly present her related claims in her appellate brief. Pursuant to App.R. 16(A)(7), the appellant must include in its brief an argument containing the contentions of the appellant with respect to each assignment

of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies.

In adjudicating a motion for sanctions under Civ.R. 11, a trial court must consider whether the individual signing the document: (1) has read the pleading; (2) has good grounds to support it to the best of his or her knowledge, information, and belief; and (3) did not file it for purposes of delay. If the trial court determines that the filing did not meet one or more of these requirements, then the court must determine whether the violation was willful.

The appellant is required to submit a transcript of the trial proceedings. Without a transcript, the appellate court must presume the regularity of the proceedings of the trial court and that the facts were correctly interpreted. Sanctions of attorney fees were properly assessed against the attorney because, without a transcript for court to review, the appellant failed to demonstrate she had not willfully violated Civ.R. 11 and R.C. 2323.51.

TOPIC: **An appeal is deemed frivolous when it does not present a reasonable question for review.**

TITLE: **Waller v. Menorah Park Ctr. For Senior Living, 2019-Ohio-671**
COURT: **Court of Appeals, Fifth District**
COUNTY: **Stark County**
DATE: **February 19, 2019**

Marie A. Waller ("Appellant") was an employee of Menorah Park Center for Senior Living ("Appellee"). After she slipped and fell into a tub while cleaning it, appellant filed a worker's compensation claim. Her claim was allowed, and then she filed subsequent claims.

On April 20, 2016, the trial court filed a Judgment Entry indicating that the case had been settled by agreement of the parties and dismissing the case. In in its Judgment Entry, the trial court ordered that "A final agreed upon judgment entry approved by counsel for all parties shall be filed with the Court within 30 days of the filing of the within entry."

On February 9, 2018, appellant filed a Motion to Enforce Settlement. Appellant, in her motion indicated that on or about December 4, 2017, she had mailed all executed settlement documents to Appellee's counsel. She claimed that on December 20, 2017, her counsel had received a call from Appellee's counsel rejecting the settlement agreement.

A hearing was scheduled on the Motion to Enforce Settlement for March 16, 2018. The trial court noted that after appellant's counsel realized that there was no legal basis for her motion, appellant retracted her argument that the settlement was valid and made an oral motion to withdraw the Motion to Enforce. The trial court granted the motion to withdraw. The trial court also granted appellee's request for attorney fees and ordered that counsel for appellant pay the sum of $1,277.50 to appellee.

R.C. 2323.51 provides a court may award court costs, reasonable attorney fees, and other reasonable expenses incurred in connection with the civil action or appeal to any party to the civil action or appeal who was adversely affected by frivolous conduct. A motion for sanctions brought under R.C. 2323.51 requires a three-step analysis by the trial court. The trial court must determine (1) whether the party engaged in frivolous conduct, (2) if the conduct was frivolous, whether any party was adversely affected by it, and (3) if an award is to be made, the amount of the award.

The Court of Appeals upheld the trial courts determination of a frivolous filing and award of attorney's fees and expenses. The Court noted that the "Plaintiff's [appellant's] counsel admitted that there was no legal basis for the motion to enforce settlement to be filed. It is every attorney's duty to know the laws that apply to his or her case. Even after this mistake was made, Plaintiff [appellant] had three weeks in between the filing of the brief in opposition and the hearing date in which she could have withdrawn her motion to enforce."

The Court of Appeals also awarded $1,358.75 in attorney fees and expenses expended for the appeal. App.R. 23 provides a court of appeals with authority to order an appellant or his attorney to pay the reasonable expenses of the appellee, including attorney fees and costs, where the court determines that the appeal is frivolous. The function of App. R. 23 is to compensate a non-appealing party for the expenses incurred in having to defend a frivolous appeal and to deter frivolous appeals in order preserve the appellate calendar and limited judicial resources for cases that are truly worthy of the court's consideration. (Citations omitted).

TOPIC: **A satisfaction of judgment renders an appeal from that judgment moot. A law firm does not have standing to appeal a Civ.R. 11 judgment against an attorney. If a party persists in relying on allegations or factual contentions with no evidentiary support, the party has engaged in frivolous conduct under R.C. 2323.51(A)(2)(a)(iii).**

TITLE: **Hoover Kacyon, L.L.C. v. Martell, 2018-Ohio-4928**
COURT: **Court of Appeals, Fifth District**
COUNTY: **Stark County**
DATE: **December 3, 2018**

Wife filed a motion under Civ.R. 60(B), requesting relief from the Decree of Divorce and Separation Agreement between Husband and Wife. She argued she was entitled to relief from judgment due to newly discovered evidence and fraud and/or misrepresentation. Wife subsequently amended her motion, withdrawing her claims of fraud and misrepresentation.

Husband filed a motion for sanctions against Wife and her counsel, alleging the motion for relief from judgment was frivolous and brought in bad faith. The trial court granted Husband's motion pursuant to Civ. R. 11 and R.C. 2323.51. The trial court awarded $34,620.00 to Husband for attorney's fees and costs. Wife and her counsel paid the judgment.

Wife dismissed the remainder of her pending motion for relief from judgment. Husband filed a motion for sanctions against Wife and her counsel pursuant to Civ.R. 11, R.C. 2323.51,

and R.C. 3105.73. Husband argued Wife and her counsel engaged in frivolous conduct for filing a motion for relief from judgment alleging Wife was incompetent and under duress when she signed the Separation Agreement and Decree of Divorce.

The trial court found at the time of the filing of the Civ.R. 60(B0 motion, Wife's counsel did not possess good grounds pursuant to Civ.R. 11 to support the argument of incompetency. The court also found under R.C. 2323.51, Wife and counsel engaged in frivolous conduct by filing a motion with no evidentiary support. The Husband was entitled to $80,000 in attorney's fees for the frivolous filing based on R.C. 3105.73. Hoover Kacyon, LLC, the Wife's law firm appealed both judgments.

The Court of Appeals dismissed the law firm's appeal of the judgment for lack of jurisdiction because the law firm lacked standing pursuant to Civ.R. 11. The payment of a judgment rendered the appeal from that judgment moot.

The Court of Appeals then determined whether the law firm had standing to appeal the trial court's judgment as to Civ. R. 11. A law firm cannot be sanctioned pursuant to Civ.R. 11 because the trial court could only sanction the individual attorneys who signed the pleadings. The law firm, as a legal entity, had not been prejudiced by the judgment, and thus, it did not have a personal stake in the outcome in the action and did not have standing to appeal the Civ.R. 11 issue.

The Court held that the trial court did not err in determining that a wife and her counsel's conduct was frivolous under R.C. 2323.51(A)(2)(a)(iii). If a party makes an allegation or factual contention on information or belief, then the party must have the opportunity to investigate the truth of that allegation or factual contention. However, if a party persists in relying on that allegation or factual contention when no evidence supports it, then the party has engaged in frivolous conduct under R.C. 2323.51(A)(2)(a)(iii). The wife and her counsel's persistence in pursuing her claims of mental incompetence amounted to frivolous conduct. Additionally, the Court upheld the award of $80,000 in attorney's fees because the trial court appropriately used R.C. 3105.73(B) to determine the amount of the sanction.

GUARDIANSHIPS

TOPIC: **To vacate a final account pursuant to R.C. 2109.35(B), appellant must demonstrate that it was a person affected by the order, it was not a party to the proceeding in which the order was made, it had no knowledge of the proceeding in time to appear in it, and there is good cause to vacate the order.**

TITLE: **In re Stropky, 2018-Ohio-5371**
COURT: **Court of Appeals, Fifth District**
COUNTY: **Stark County**
DATE: **December 28, 2018**

Kahler was the court appointed guardian of the estate of John Stropky ("Stropky"). He filed a guardian's inventory on July 11, 2016 and an amended guardian's inventory on December 1, 2016. He then filed a motion to resign as guardian on December 21, 2016. The trial court granted the motion on December 22, 2016 and ordered appellee to file a final account within thirty days. Kahler filed a final account on February 9, 2017. On March 29, 2017, the trial court approved and settled the account, finding the guardianship estate was fully and lawfully administered and discharged Kahler as guardian.

Rose Lane Health and Rehabilitation, Inc. ("Rose Lane") filed a motion to vacate the entry approving and settling account on February 7, 2018. Rose Lane claimed Kahler breached his statutory duties as guardian and thus good cause existed for vacating the entry approving and settling account. Rose Lane alleged Stropky was indebted to Rose Lane in excess of $110,000.

The trial court held Kahler was not responsible for Stropky's debt to Rose Lane and denied the motion to vacate. The court found that Rose Lane had not required Kahler to sign the Residency Agreement in his representative capacity as guardian of Stropky's guardianship estate. Therefore, the Guardianship was never a party to the Residency Agreement. Rose Lane appealed.

The court of appeals held that to vacate a final account pursuant to R.C. 2109.35(B), appellant must demonstrate that it was a person affected by the order, it was not a party to the proceeding in which the order was made, it had no knowledge of the proceeding in time to appear in it, and there is good cause to vacate the order.

The Court of Appeals held that the trial court erred when it held that the appellant has not shown "good cause" to vacate the order. The appellant demonstrated that it was a person affected by the order, it was not a party to the proceeding in which the order was made, and it had no knowledge of the proceeding in time to appear in it. Accordingly, the trial court erred in not granting appellant's motion to vacate the entry approving and settling account.

TOPIC: **The appointment of a guardian is not clearly erroneous when the ward consented to the appointment at the magistrate's hearing and did not file objections.**

TITLE: **<u>In re Guardianship of Ronald Foster</u>, 2019-Ohio-1649**
COURT: **Court of Appeals, Eighth District**
COUNTY: **Cuyahoga County**
DATE: **May 2, 2019**

Ronald Foster appealed the appointment of Peter Russell as the guardian of his estate and of his person. Foster's siblings requested a guardian be appointed to Foster after he was admitted to the hospital for vascular dementia, psychosis, diabetes, and multiple medical issues. The probate court appointed Foster independent legal counsel under R.C. 2111.02(C)(7).

Foster consented to the court appointing Russell as guardian. Foster did not file objections to the magistrate's decision. Foster then filed a written request with the probate court, asking the court to evaluate the continued necessity of the guardianship. Under R.C. 2111.49(C), when the ward alleges competence, the court is required to conduct a hearing at which time the guardian or applicant for guardianship must prove the ward's continued incompetence by clear and convincing evidence.

The Court of Appeals held that because Foster did not file objections to the magistrate's decision personally or through his appointed counsel, the appeal can only be reviewed for plain error. The Court held that since Foster was represented by counsel during the probate court proceedings and consented to the appointment of the guardian, there was no plain error or manifest miscarriage of justice. By consenting to the outcome, Foster relieved the applicant for guardianship of the burden to demonstrate his incompetence by clear and convincing evidence.

TOPIC: **A father was appropriately held in indirect contempt for forging his attorney's signature on a guardianship application.**

TITLE: **In Re Guardianship of Polete, 2018-Ohio-5275**
COURT: **Court of Appeals, Second District**
COUNTY: **Montgomery County**
DATE: **December 28, 2018**

Sean Polete is the father of Bailey, an adult child with medical and developmental disabilities. When she turned 18 years-old, Carrie Polete, Bailey's mother, filed an application to become Bailey's guardian. Mr. Polete expressed the desire to file an application to become a co-guardian. At the guardianship hearing, the matter was referred for mediation, which was unsuccessful. The Poletes subsequently filed for divorce and a guardian ad litem was appointed.

In March 2017, both parties consented to the appointment of a third-party guardian and withdrew their respective guardianship applications. Mr. Polete subsequently sought to withdraw his consent, but the probate court denied the request. On April 7, 2017, the court appointed Melinda Poist, one of Bailey's therapists, as guardian.

Poist alleged Mr. Polete engaged in repeated behavior that interfered with Bailey's caregivers and which also interfered with Poist's ability to act as guardian. In August 2017, Poist filed a motion seeking to resign as guardian, citing Mr. Polete's behavior, which she claimed rendered her unable to continue in the capacity of guardian.

On September 15, 2017, Mr. Polete attempted to file an application for guardianship of Bailey. The clerk for the probate court noticed that Mr. Polete tried to file a duplicate of a previously filed application. She printed a blank application for him to complete. Mr. Polete completed the form while standing at the clerk's desk. When the clerk took the form to the court's chambers, she realized that Mr. Polete had forged his attorney's signature. After reviewing the application, the court issued a show cause order alleging that the form contained a forged signature.

At the hearing, Mr. Polete testified that he did bring the previously-filed application, which was signed by his attorney. His attorney advised him to take the form to the courthouse to file. She did not seem to notice that it was the previously filed form. When Mr. Polete completed the new form, he claimed that he merely "transcribed" the information from the denied application onto the blank application, and that he "believed" he had Holm's implied consent to sign her name to the document. Mr. Polete further testified that he had "no intent to defraud the Court" or to "delay or impede the judicial process." The magistrate held Mr. Polete in indirect criminal contempt of court and ordered him to pay $500 as a sanction. The probate court adopted the decision. Mr. Polete appealed.

The Court of Appeals held that the probate court did not abuse its discretion in finding Mr. Polete in contempt of court under R.C. 2705.01 because there was sufficient evidence upon which a reasonable trier of fact could conclude his acts were intentional and that they impeded the effective administration of justice. Even without direct evidence, forging a signature on a document required for a guardianship action and then submitting it for filing with a court constitutes misconduct.

TOPIC: **A trial court's duty to issue findings of fact and conclusions of law is mandatory when such request complies with Civ.R. 52.**

TITLE: **<u>In re Guardianship of Bernie,</u> 2019-Ohio-334**
COURT: **Court of Appeals, Twelfth District**
COUNTY: **Butler County**
DATE: **February 4, 2019**

Appellant, Marlene Penny Manes ("Penny"), appealed a decision of the Butler County Court of Common Pleas, Probate Division, denying her motion to remove the guardian previously appointed by the court for William Bernie ("Bill"), or, in the alternative, to have the guardian show cause for denying her visitation with Bill.

Penny and Bill were in a romantic relationship for eight years before Bill contracted encephalitis. The virus severely affected Bill's cognitive function and he now requires 24-hour care. Prior to contracting encephalitis, Bill had executed a general power of attorney and a health care power of attorney, giving authority to his siblings for his affairs and healthcare. Howard Bernie, Bill's brother, was appointed as Bill's guardian. Howard and Penny disagreed regarding Bill's care, which led to Howard denying Penny visitation with Bill.

On appeal, Penny argued that the probate court erred when it refused to issue findings of fact and conclusions of law pursuant to Civ. R. 52. The Court of Appeals disagreed, holding that the probate court offered sufficient findings of fact and conclusions of law to allow meaningful appellate review of a guardianship proceeding. The probate court specifically found that the guardian's decisions regarding the ward's care were made in "good faith" and in furtherance of what the guardian believed to be in the ward's best interest.

Penny also asserted that the probate court erred in not considering the Rules of Superintendence governing its responsibilities of guardians mandatory. Penny believed the probate court should have found Howard in violation of the Superintendence Rules.

The Superintendence Rules are administrative directives only and do not function as, or have the force of, law in the same manner as rules of practice and procedure. Instead, the Superintendence Rules are internal "housekeeping rules" of concern to judges but create no rights in individual defendants. As such, a violation of the Superintendence Rules is not grounds for reversal on appeal.

The Court of Appeals found that the guardian did not violate Sup.R. 66.09(E) by suspending the girlfriend's visitation based upon the ward's medical problems and the inability of the girlfriend to effectively communicate with the guardian.

TOPIC: **A probate court's determination concluding a guardianship is warranted is not an abuse of discretion, even if the Appellant's health has improved and a less restrictive alternative to a guardianship exists.**

TITLE: **<u>In re Guardianship of Mannies</u>, 2019-Ohio-430**
COURT: **Court of Appeals, Sixth District**
COUNTY: **Wood County**
DATE: **February 8, 2019**

Appellant, Wayne Mannies, appealed from the July 2, 2018 judgment of the Wood County Court of Common Pleas, Probate Division, declaring appellant incompetent due to a developmental disability. The court appointed a guardian of the person of appellant.

On January 26, 2018, an emergency guardianship was established for the appellant because of health issues. The court extended the guardianship until March 1, 2018. A healthcare power of attorney was executed on appellant's behalf in March 2018.

A court investigator concluded that appellant could not take care of his personal finances, care for himself, drive, or take medications due to his moderate intellectual disability. The appellant asserted his opposition to the guardianship at a review hearing on July 2, 2018. He asserted that the failure of health care providers to understand the healthcare power of attorney was an insufficient reason to continue the guardianship.

The guardian and service coordinators from the Wood County Board of Developmental Disabilities testified that the guardianship should continue. The guardian stated that the appellant could not make decisions for himself and had not been taking his medicines on his own. The service coordinators testified that some health care providers will not speak with the guardian if appellant only had a power of attorney.

At the hearing, the probate court continued the guardianship based on the court investigator's evaluation, the expert's report, and the appellant's overall demeanor. The probate court indicated that the least restrictive means of the power of attorney was insufficient.

The Court of Appeals upheld the probate court's decision because although the appellant's health issues had improved, there was no evidence to substantiate the claim that the improvement was because of the healthcare power of attorney. The Court noted that the probate court had considered the appellant's objections and observed his demeanor before concluding that a guardianship was warranted. Therefore, the probate court did not abuse its discretion.

TOPIC: **There are circumstances in which a non-party next-of-kin can intervene in a guardianship proceeding as a matter of right, pursuant to Civ.R. 24(A)(2).**

TITLE: **<u>In re Guardianship of Bakhtiar</u>, 2019-Ohio-581**
COURT: **Court of Appeals, Ninth District**
COUNTY: **Lorain County**
DATE: **February 19, 2019**

Khashayar Saghafi appealed from the judgment denying his motion to intervene in the guardianship proceedings involving his mother, Fourough Bakhtiar.

Saghafi filed a motion to intervene as a party in the guardianship proceedings in order to gain access to the guardianship file, to obtain visitation with his mother and for other next of kin, to obtain and evaluate his mother's records, to obtain and review probate court filings, to obtain and review financial records related to the guardianship, to exercise his rights as next of kin, and to request evidentiary hearings on matters that affect the best interests of his mother. The trial court denied the motion to intervene, stating "there is no recognized right or need to 'intervene' in a guardianship. Mr. Saghafi may request the Court for any of the relief that he listed in his Motion to Intervene, without necessity to intervene."

Saghafi appealed, asserting the probate court erred when it failed to preserve the best interests of the ward in denying his motion to intervene in the guardianship proceeding.

The Court of Appeals agreed with Saghafi, finding that there are circumstances in which a nonparty next of kin would be permitted to intervene as a matter of right, pursuant to Civ. R. 24(A)(2). Citing an Ohio Supreme Court case in which the Court stated that the appellant "could have filed a motion to intervene," the Court of Appeals concluded that there is in fact a recognized right or need to intervene in guardianship proceedings. *In re Guardianship of Santrucek*, 120 Ohio St.3d 67, 2008-Ohio-4915. The case was remanded for the trial court to consider whether Saghafi met the standard required in Civ.R.24(A)(2) to intervene in the guardianship proceedings.

NAME CHANGES

TOPIC: **When granting an application for a name change for a minor child from the child's female birth name to a male name, the probate court must consider seven factors in determining whether the name change serves the child's best interest and give special weight to the parents' assessment of their child's best interest.**

TITLE: **In re H.C.W., 2019-Ohio-757**
COURT: **Court of Appeals of Ohio, Twelfth District**
COUNTY: **Warren County**
DATE: **March 4, 2019**

The mother of H.C.W. filed an application to change her 15 year-old child's name from her female birth name to a male name, with the father's consent. H.C.W. had completed approximately 20 hour-long sessions with a therapist who specialized in transgender issues and had been formally diagnosed with gender dysphoria. The child was scheduled to begin testosterone therapy at Children's Hospital. The child had a short hair-cut, wore male clothing and has been going by a male name at school and at home. The parents petitioned the court for a legal name change to help the child formalize the gender change for purposes of a driver's license, passport, prescriptions, and college applications.

Pursuant to R.C. 2717.01(B) the standard for deciding whether to permit a name change for a minor is proof that the facts set forth in the application show reasonable and proper cause for changing the name of the applicant. The trial court must consider the best interest of the child in determining whether reasonable and proper cause has been established.

In considering a gender name change for a transgender child, a court should consider:

(1) the age of the child;
(2) the child's motivations regarding the name change;
(3) the length of time the child has used the preferred name;
(4) any potential anxiety, embarrassment, or discomfort that may result from the child having a name he or she believes does not match his or her outward appearance and gender identity;
(5) the history of any medical or mental health counseling the child and parents have received;
(6) the name the child is known by in his or her family, school, and community; and
(7) the wishes and concerns of the child's parents.

The Court of Appeals held that the probate court erred in failing to consider the parents' assessment of their child's best interest. The court should give the parents' assessment some special weight when ruling upon the name change application. The probate court abused its discretion by failing to consider appropriate best interest factors before it denied the name change application.

TOPIC: **A probate court has no authority to amend a birth certificate to add race and nationality classifications in a name change.**

TITLE: **In re Easterling, 2019-Ohio-1516**
COURT: **Court of Appeals, First District**
COUNTY: **Hamilton County**
DATE: **April 24, 2019**

Appellant filed an application in the probate court seeking to change his "Name/Race/Nationality." He requested his name be changed from Douglas Brett Easterling, Jr to Raphael Kulika Bey. He also requested that the probate court change his race from "Black/African American" to "Moor/Aboriginal American national." The only evidentiary material attached to the application was a copy of his certificate of live birth. The certificate did not list his race or nationality.

R.C. 2101.24(A)(2) and 3705.15 provide the probate court with jurisdiction over the registration of unrecorded births and the correction of birth records. R.C. 3705.15 provides that anyone born in Ohio whose registration of birth has not been properly and accurately recorded, may file an application with the probate court to correct that birth record. The application must set forth all of the available facts required on the birth record that is sought to be corrected.

The probate court changed Appellant's name as requested, but denied the race and nationality designation change. The Court of Appeals upheld the trial court's decision. The probate court did not have authority to add additional facts to the birth record provided. The probate court only has jurisdiction to correct facts already on the record.

PROCEDURE

TOPIC: **An affidavit may not be disregarded simply because the person providing the affidavit has an interest in the outcome of the litigation. There is not a requirement of a "susceptible testator" if the will is not being contested.**

TITLE: **Estate of Henderson v. Henderson, 2018-Ohio-5264**
COURT: **Court of Appeals, Ninth District**
COUNTY: **Lorain County**
DATE: **December 28, 2018**

James Peter Henderson and Martha L. Henderson had three sons. In February 2007, both parents executed a durable power of attorney designating son Gene Henderson, as attorney in fact. James Henderson died in December 2007. Martha Henderson died in November 2010.

In September 2011, the Estate of Martha L. Henderson and the two other sons filed a complaint against Gene Henderson, including claims for breach of fiduciary duty, fraud, misrepresentation, undue influence, constructive trust, accounting, conversion, tortious

interference with expectancy, replevin, and punitive damages/attorney fees. The most significant event was a wire-transfer transaction of $185,820.00 from a money market account held by Martha and Peter Henderson to Gene. The transfer occurred in September 2007, while Peter Henderson was alive.

The trial court granted partial summary judgment to Gene regarding the transfer. The trial court based its findings on an affidavit provided by a bank officer regarding the wire transfer. The court held that the evidence was "overwhelming that on September 21, 2007, James "Pete" Henderson went to the Credit Union and wire-transferred the sum of $185,820.00 from one of his accounts to Gene."

The Court of Appeals held that that trial court erred in finding that the evidence was overwhelming. The trial court did not consider an affidavit of one of the other sons, stating that James Henderson did not have the physical or mental capacity in September 2007 to go to the bank and make the transfer. The court noted that the affidavit may not be disregarded simply because the son had an interest in the outcome of the litigation. A non-moving party may rely on a self-serving affidavit to satisfy his reciprocal burden for summary judgment, as long as the affidavit relates to a genuine issue of material fact.

Additionally, the Court of Appeals held that not all claims for undue influence require a "susceptible testator." Because this was not a will contest case, there was not a requirement of a susceptible testator. The claim for undue influence did not fail because the money was not transferred by way of a testamentary gift. The issue of a fiduciary duty between Gene and his parents by the durable power of attorney was not addressed by the trial court. A gift to family members who are in a fiduciary relationship must yield to a more specific presumption of undue influence.

TOPIC: **When the motion on which the probate court ruled was filed in a different court and had already been ruled upon, the ruling is void.**

TITLE: **Estate of Welch v. Taylor, 2018-Ohio-4558**
COURT: **Court of Appeals, Twelfth District**
COUNTY: **Clinton County**
DATE: **November 13, 2018**

Plaintiffs filed a complaint in the Clinton County Court of Common Pleas, General Division, alleging that Defendant exercised undue influence upon decedent before his death. The general division court dismissed Plaintiffs' suit in an order granting judgment on the pleadings, finding that the probate court held proper jurisdiction over the matter. However, the general division's "Final Judgment" order did not include a transfer to the probate court. It was actually a straight dismissal of "all claims by plaintiffs."

Plaintiffs then filed a complaint in the probate division alleging that the inter vivos transfers from decedent to Defendant were predicated upon undue influence, requesting declaratory judgment, and alleging that Defendant was liable for conversion and unjust

enrichment. Defendant filed a motion for summary judgment and moved to stay discovery until the probate court ruled on her motion for summary judgment.

The probate court held a hearing on the motions and later issued a judgment entry finding in favor of the Defendant. The probate court's entry indicated that it ruled upon Defendant's pleadings filed in November 2016 which was actually the original claim filed in the Court of Common Pleas, General Division. The only pending motions before the probate court were Defendant's motion for summary judgment and to stay discovery, as well as Plaintiffs' motion to compel discovery.

The Court of Appeals held that the probate court's decision was void. It had ruled on a motion that was never before it, and one that had been decided by a different court. The judgment of the probate court was reversed and remanded for the probate court to consider the correct motions.

TOPIC: The probate court does not have jurisdiction over claims based on contract law.

TITLE: Wiggins v. Safeco, 2019-Ohio-312
COURT: Court of Appeals, Second District
COUNTY: Montgomery County
DATE: February 1, 2019

Plaintiff, Wiggins, was administrator of his wife's estate. While the estate was being probated, the family home, titled solely in the wife's name, was damaged in a fire. The wife had an insurance policy through Praetorian Insurance. Wiggins had also purchased an insurance policy from Safeco after his wife's death. Both insurance policies provided the same coverages. Both insurance policies provided that if a loss covered by the policy was also covered by another policy, the insurance company would pay only its proportionate share of the loss, based on the total amount of coverage available. Safeco refused to cover the entire loss, claiming the Pratorian policy was responsible for part of the loss.

Wiggins filed a declaratory-judgment action in the probate court in June 2018, individually and as administrator of his wife's estate, against SafeCo, Liberty Mutual Group, Inc. Praetorian, Seterus, Federal National Motgage Association, and the City of Dayton. All of the claims related to the SafeCo insurance policy and his belief that, under the policy, Safeco was obligated to fully pay for his losses from the fire and to pay all of the proceeds to him.

The probate court dismissed Wiggins complaint for a declaratory judgment because it lacked subject matter jurisdiction under R.C. 2101.24(A)(1)(l) to address issues relating to defendant's obligations to plaintiff under his homeowner's insurance policy. The matter involved a contract dispute between the parties that was unrelated to the administration of the estate, therefore the probate court did not have jurisdiction. The probate court also lacked concurrent jurisdiction under § 2101.24(B)(1)(c)(i) over plaintiff's action because it did not involve a designation or removal of a beneficiary of a life insurance policy, annuity contract, retirement

plan, brokerage account, security account, bank account, real property, or tangible personal property. The Court of Appeals affirmed.

TOPIC: **A meritorious claim or defense must be alleged to require the trial court to hold an evidentiary hearing for a Motion for Relief from Judgment under Civ.R. 60(B).**

TITLE: **RiverPark Group, LLC v. City of Dublin, 2019-Ohio-723**
COURT: **Court of Appeals, Tenth District**
COUNTY: **Franklin County**
DATE: **February 28, 2019**

Dublin initiated an eminent domain action to acquire easements from RiverPark's property for construction of a public shared-use path as an appurtenance to the road.

On March 31, 2016, RiverPark filed a complaint for damages, temporary restraining order, and preliminary injunction, alleging that Dublin had trespassed on the property when, in September 2015, Dublin exercised its quick-take authority, and entered the property to begin construction of a public project.

The parties then notified the trial court that they had reached a settlement agreement. However, on May 26, 2016, before the parties submitted a settlement entry for the trial court's approval, RiverPark's counsel filed a motion to withdraw as counsel because RiverPark was unresponsive to communications from his attorneys and reasonable requests from Dublin. They also noted that RiverPark had instructed them to rescind the settlement agreement which was previously authorized.

RiverPark engaged new counsel and the parties agreed to the previously agreed-upon settlement. The parties recorded the settlement agreement with the trial court on June 29, 2016. On July 5, 2016, the trial court dismissed RiverPark's case against Dublin with prejudice, but retained jurisdiction to enforce the parties' settlement agreement.

Nearly one year later, on June 27, 2017, RiverPark sought to rescind the parties' settlement agreement by reopening the TRO action through a motion for relief from judgment under Civ.R. 60(B)(3), alleging that Dublin had engaged in fraud. RiverPark's primary allegation was that Dublin had failed to comply with the terms of the parties' settlement agreement.

Pursuant to Civ.R. 60(B), all of the requirements for relief from judgment must be satisfied. The three requirements are: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ. R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ. R. 60(B)(1), (2), or (3), not more than one year after the judgment, order or proceeding was entered or taken.

The trial court found that RiverPark's motion failed to specifically allege that it has a meritorious claim or defense if relief was granted and failed to prove that it was filed within a reasonable time. Since two of the three requirements were not satisfied, RiverPark's Motion for Relief from Judgment was denied. On appeal, RiverPark claimed the trial court erred in denying the motion for relief from judgment under Civ.R. 60(B)(3) without holding an evidentiary hearing.

The Court of Appeals upheld the trial court's findings. Because the demonstration of a meritorious claim or defense is a requirement for relief for judgment, and RiverPark's motion did not allege that it had a meritorious claim or defense, there was no requirement for an evidentiary hearing.

TRUSTS

TOPIC: **A Trust has standing to bring a claim for declaratory judgment concerning the ownership rights of a property when it is the residuary beneficiary of an estate.**

TITLE: **Gerston v. Parma VTA, L.L.C., 2018-Ohio-2185**
COURT: **Court of Appeals, Eighth District**
COUNTY: **Cuyahoga County**
DATE: **June 7, 2018**

The Decedent and his wife, Kimberly, had formed a Trust which named the survivor of them as the trustee. The Decedent was the sole owner of an LLC and owned a 76.62% majority interest in the subject property. The Appellants owned a minority 23.28% interest in the property. Kimberly, appellee and now primary trustee of his trust, sought a declaratory judgment declaring the trust to be the owner of the LLC. She also claimed breach of fiduciary duty, fraudulent conveyance, and conspiracy on behalf of the Trust.

When decedent created the trust, he also created his last will and testament. The will provided that upon his death, the remainder of his estate and property were to pour over into the assets of the trust. The Appellants contend that the Trust does not have standing because if it had an ownership interest in the property it would have passed to his estate through probate. The Court of Appeals held that the trust was a beneficiary of the estate with a vested interest in the outcome of the litigation, therefore finding the trust had standing.

The Appellants claimed that the decedent transferred his interests in the subject to them through an oral contract prior to his death. It was undisputed that there was no writing or document conveying, assigning, or transferring decedent's majority interest in the property to Appellants. The Appellants argued that the statute of frauds did not apply because the ultimate issue in the case was not the transfer of real estate but, rather, the transfer of a membership interest in the LLC. Appellants also claimed that the statute of frauds claim was not raised at the trial court level.

The Court of Appeals upheld the trial court's decision in favor of the Trust. A transfer, conveyance, or assignment would be subject to the statute of frauds. An agreement that does not comply with the statute of frauds is unenforceable. The Court found that the record showed the trial court questioned Appellants' counsel about the statute of frauds issue during an in-chamber conference. Since there was no writing signed by the decedent or the Trust, the trial court properly found that any alleged oral assignment did not comply with the statute of frauds or transfer provisions as set forth in the loan documents.

TOPIC: **A grantor of an irrevocable trust does not have standing to bring an action to modify the trust terms to obtain more favorable tax terms.**

TITLE: **Millstein v. Millstein, 2018-Ohio-2295**
COURT: **Court of Appeals, Eighth District**
COUNTY: **Cuyahoga County**
DATE: **June 14, 2018**

Appellant created two irrevocable trust agreements for the benefit of his children. He retained no rights as a beneficiary of the trusts, is responsible for reporting any net taxable income associated with the trusts. On July 28, 2017, Appellant filed a petition for declaratory and equitable relief. He alleged that under federal income tax law, the two trusts were designed so Appellant would personally report the federal taxable income, deductions and credits realized from the investments of trusts under the "grantor trust" rules of the Internal Revenue Code sections 671 et seq. He sought "equitable reimbursement of income taxes" from the two trusts as well as a "virtual representation" finding of the relevant beneficiaries of the two trusts for the purpose of effectuating such reimbursement.

The trust beneficiaries named as defendants in Appellant's petition moved for the petition to be dismissed pursuant to Civ.R. 12, arguing that 1) appellant lacked standing to request that the trusts make any payment to him, 2) that there is no cognizable claim in Ohio for equitable reimbursement to a grantor for tax liability incurred under the terms of a trust the grantor created, 3) appellant's claim was inequitable and 4) appellant's petition was barred by collateral estoppel. The trial court granted the motions to dismiss on October 18, 2017, without opinion.

On appeal, Appellant only alleged that the trial court erred in dismissing his petition for equitable relief pursuant to Civ.R. 12. The Court of Appeals upheld the trial court's dismissal of the claims. It held that the relief sought by appellant is specifically addressed in the Ohio Trust Code and unavailable to him without the cooperation of a trustee or beneficiary.

Under R.C. 5804.16, "To achieve the settlor's tax objectives, the court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intention. The court may provide that the modification has retroactive effect." However, pursuant to R.C. 5804.10, only a trustee or beneficiary may commence a proceeding to approve or disapprove a proposed modification under R.C. 5804.16. R.C. 5804.10 specifically limits a settlor's ability to commence

a proceeding to approve a proposed modification or termination of a trust to certain situations involving the consent of the trust's beneficiaries under R.C. 5804.11. The court held that Appellant did not bring the suit under R.C. 5804.11 and is precluded by R.C. 5804.10 from unilaterally seeking modification to achieve his tax objectives under R.C. 5804.16. The Court noted that no court may employ equitable principles to circumvent valid legislative enactments.

TOPIC: **A creditor is able to enjoin a trustee from making prospective distributions from the spendthrift trust to the beneficiary when the beneficiary has an unqualified right to withdraw from the trust.**

TITLE: **Fahey Banking Co. v. Carpenter, 2019-Ohio-679**
COURT: **Court of Appeals, Tenth District**
COUNTY: **Franklin County**
DATE: **February 26, 2019**

Plaintiff-appellant, the Fahey Banking Company ("Fahey"), appealed from a judgment of the Franklin County Court of Common Pleas granting the Civ.R. 12(B)(6) motion to dismiss of defendant-appellee Stephen D. Enz, Trustee of the Kenneth N. Carpenter Irrevocable Trust ("Trustee"). The trial court determined that the trust is a spendthrift trust and held that R.C. 5805.01 prohibits a creditor of the beneficiary from reaching the interest or a distribution from a spendthrift trust by the trustee before its receipt by the beneficiary.

The Trial Court erred by failing to recognize that a present right of withdrawal from a Trust is a present ownership interest to which a spendthrift provision does not apply and the interest may be attached by a creditor pursuant to a Creditor's Bill under R.C. § 2333.01. R.C. 5805.05(A) states:

> To the extent that a trust that gives a beneficiary the right to receive one or more mandatory distributions does not contain a spendthrift provision, the court may authorize a creditor or assignee of the beneficiary to attach present or future mandatory distributions to or for the benefit of the beneficiary or to reach the beneficiary's interest by other means.

The Court of Appeals held the language "to the extent" applies to the spendthrift provision and not to the right to receive one or more mandatory distributions. Therefore, the mere existence of a spendthrift provision in a trust is not dispositive of the right of a creditor to gain access to trust distributions that are mandatory. Based on R.C. 5805.06, since Carpenter has the power to withdraw an amount annually, she could be treated as the settlor of a revocable trust but only to the extent of the amount that she may withdraw annually ($5,000 or five percent of the principal).

TOPIC: **A beneficiary does not have a choice between occupying any of the settlor's properties when the language of the trust stipulates a specific property.**

TITLE: **Wyper v. DuFour, 2019-Ohio-1035**
COURT: **Court of Appeals, Sixth District**
COUNTY: **Wood County**
DATE: **March 22, 2019**

Dan Wyper included a provision in his trust for Nadine DuFour to live in his home located at 11149 River Bend Court West, Perrysberg, Ohio. ("River Bend") When he died, he and Nadine were living together in Dan's other home, located at 29666 Chatham Way in Perrysberg ("Chatham"). Dan had leased the River Bend property to a tenant on a one-year lease with an automatically renewing month-to-month option. The tenant was living at the River Bend Property at the time of this appeal.

Nadine was named the Trustee of the Trust. Margaret and David Wyper, Dan's children, sought to remove Nadine as trustee for failure to make distributions to them in accordance with the trust agreement. The court removed Nadine as trustee and appointed a successor trustee.

The successor trustee requested assistance from the court to sell the Chatham property. Margaret and David wanted to sell the Chatham property in an effort to prevent foreclosure. The property was encumbered with a mortgage and the income generated from the trust was insufficient to make the mortgage payments.

Nadine claimed that she had a right to continue living at the Chatham property. The trial court found that the language in the trust was clear. Dan specified that Nadine was to have a right to occupy the River Bend property. The court noted that he had ample time to amend his trust to allow her to live in the Chatham property prior to his death.

The Court of Appeals upheld the trial court's decision. The language in the trust was not ambiguous. Nadine was entitled to the exclusive occupancy of the River Bend property.