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Summit County Probate Court Case Law Update

Magistrate Crystal D. Burnett

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OHIO SUPREME COURT

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CASE LAW UPDATE

OHIO SUPREME COURT

CREDITOR'S CLAIMS AGAINST ESTATE

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

TITLE: Embassy Healthcare v. Bell, 2018-Ohio-4912

COURT: Supreme Court of Ohio

COUNTY: Warren County

DATE: December 12, 2018

Embassy operated the nursing facility in which Robert, the decedent, stayed prior to his death. Robert entered into an agreement with Embassy that stated that Robert, as the resident, was responsible for payment in full of all amounts due to the facility.

Robert's wife, Cora, signed the agreement as the "responsible party" making her liable for services rendered to the resident, to the extent to which she had access to the resident's income.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

COURTS OF APPEAL/TRIAL COURT OPINIONS

ACCOUNTING

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

TITLE: Colburn v. Cooper, 2018-Ohio-5190

COURT: Court of Appeals of Ohio, Eleventh District

COUNTY: Lake County

DATE: December 21, 2018

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

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

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

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

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

ADOPTION

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

TITLE: In re Adoption of A.C.B., 2018-Ohio-3081

COURT: Court of Appeals of Ohio, Sixth District

COUNTY: Lucas County

DATE: August 3, 2018

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

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

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

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

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

On appeal, the father argued that the court abused its discretion by not recognizing controlling precedent when construing the meaning of maintenance and support under R.C. 3107.07(A). Specifically, he cited to *Celestino v. Schneider*, 84 Ohio App.3d 192 (6th Dist. 1992), where the sixth district held that "any contribution toward child support, no matter how meager, satisfies the maintenance and support requirements of the statute."

The court cited several Ohio District Court cases, which showed that the Ohio districts are split on the issue of whether any contribution, no matter how small, satisfies the statutory requirement. The court then pointed to a 2012 Ohio Supreme Court case, *In re Adoption of M.B.*, and held that the Supreme Court case was broad enough to implicitly overrule the ruling in *Celestino*.

In keeping with the Supreme Court's holding in *In re Adoption of M.B.*, the court held that a trial court has discretion to determine whether the payments made by the contesting parent constitute maintenance and support under the statute, and that the trial court's determination shall not be disturbed absent an abuse of discretion.

Here, the court found that there was no abuse of discretion, and the trial court's ruling, that the two payments were not enough to satisfy the requirements of the statute, was upheld.

TOPIC: **Mother's failure to provide support to the child for the year preceding the adoption petition was justified because a prior order of the court explicitly excused her from providing such support or maintenance. Her consent to adopt was required.**

TITLE: **In re Adoption of H.J.C.**
COURT: **Common Pleas, Probate Division**
COUNTY: **Clark County**
DATE: **September 25, 2018**

H.J.C., is the child of Mother, H.S. and Father, M.C., who were never married. In 2007, Father married D.C., the petitioner. In 2017, D.C. filed a petition to adopt H.J.C. Petitioner claimed that Mother's consent was not required due to her failure to support H.J.C. for the year preceding the adoption petition.

In 2007, Mother and Father entered into a shared parenting plan. In 2009, this plan was amended to name Father as the residential parent of the child. The plan stated "no exchange of child support is ordered per express agreement of the parties." From 2009 until 2018, Mother has had very little contact with the child and provided no financial assistance, maintenance, or support.

Per R.C. 3107.07, a parent who has failed without justifiable cause to provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year preceding the filing of the adoption petition forfeits his right to withhold consent to such a petition."

Here, the petition was filed in 2017 and Mother failed during the one year period to provide for the maintenance and support of the child. The question before the probate court was whether that failure was justified.

The court ruled that Mother's failure to support the child was in fact justified because it was explicitly stated in the shared parenting plan that she was not responsible for supporting the child.

The court explained, that although common law requires a parent to support his or her child, the judicial decree here excused Mother from that parental requirement. The court went on to say that because Mother relied on that judicial decree, it would be unfair for the court to fault her for following that order.

As a result, Mother's failure to support H.J.C. for the year preceding the adoption petition was in fact justified and therefore her consent was required for the adoption to move forward.

TOPIC: **Mother’s statement to father to “not come back” did not foreclose all opportunities for father to contact his children and did not constitute justifiable cause for his failure to contact his children in the year preceding the adoption petitions; his consent to the adoption was not required.**

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

The biological father, appellant, and the children’s mother divorced in 2012. In the settlement agreement, the mother was named residential and custodial parent of the couple’s two children. The court granted the Father supervised visits, which were to be scheduled between the parties. After a few visits, the mother stopped scheduling the visits and left initiating visits up to the father. As a result, no subsequent visits were scheduled and the father had not seen the children since 2014. The mother remarried in 2015.

In 2017, the stepfather filed petitions to adopt the children. The petitions alleged that the father’s consent was not required because he had failed to have contact with the children in the year preceding the petition.

At a hearing on the consent issue, the father admitted that he had not had contact with the children for several years, but he claimed it was not his choice. He testified that the last time he attempted to see his children, the police were called, and he was told not to come back in the future. He claims he could not have attempted to see his children by visiting them at their home because their mother would not allow it.

The probate court determined that the father’s consent to the adoption was not required because he had failed without justifiable cause to provide more than *de minimis* contact with the children for at least one year immediately preceding filing of the adoption petition. The father appealed.

Ohio law requires parental consent to an adoption unless a court finds, by clear and convincing evidence, that in the year preceding the adoption petition, the parent failed, without justifiable cause, to have more than *de minimis* contact with the child.

The court held that based on the testimony, the trial court correctly ruled that there was no justifiable cause for the father’s failure to contact his children in the year preceding the adoption petition. Even though the mother told the father not to come back, that did not foreclose all opportunities for the father to maintain contact with his children (i.e. phone calls, cards, or other communication). Further, the father failed to file anything with the court to attempt to “force the mother’s hand” when it came to the visitation agreement.

TOPIC: Court construed "willful" where pursuant to R.C. 3107.07, putative father's consent is not required in an adoption where he "willfully" failed to care for and support the minor child.

TITLE: In re V.R.K., 2018-Ohio-4881
COURT: Court of Appeals of Ohio, Second District
COUNTY: Greene County
DATE: December 7, 2018

After finding out she was pregnant, V.R.K.'s mother, J.C. voluntarily broke off her relationship with the putative father, C.H. There is no evidence that the putative father ever provided any support for the mother. He did not pay any portion of the mother's medical expenses during the pregnancy and did not pay anything toward the child's care and support after her birth.

Days after the child's birth, J.C. voluntarily gave the child to a private adoption agency. The agency promptly placed the child with appellees, who filed a petition to adopt. The petition alleged that the putative father, C.H.'s consent was not required under R.C. 3107.07(B)(2)(b). The matter proceeded to a hearing to resolve the need for C.H.'s consent.

At the hearing, the court found C.H.'s consent to be unnecessary because C.H. had failed to care for and support the minor

The court looked to R.C. 3107.07(B)(2) which provides that consent is unnecessary if any of the following apply: "(a) The putative father is not the father of the minor; (b) The putative father has willfully abandoned or failed to care for and support the minor; (c) The putative father has willfully abandoned the mother of the minor during her pregnancy and up to the time of her surrender of the minor."

The court made findings that C.H. was in fact that biological father, and that the evidence presented at the hearing did not establish that C.H. had willfully abandoned the child or the mother. Instead, the court looked to R.C. 3107.07(B)(2)(b), and the words "failed to care for and support the minor," and found that C.H. had never actually provided any care or support for the child.

The court explained that the clear message of R.C. 3107.07(B) is that a putative father cannot sit back and do nothing while others care for and support his child, and then claim he deserves to get custody of the child. The father had several weeks between the child's birth and the date the adoption petition was filed in which to take legal action to formally establish his parentage. He did nothing. Therefore, C.H.'s consent was unnecessary because he had failed to care for and support the minor child.

The father appealed the ruling and argued that the trial court erred in failing to consider whether his failure to care for and support the child was willful. He pointed to the words of the statute which are "the putative father has *willfully* abandoned or failed to care for and support the minor."

The issue was whether “willfully” only modified “abandoned” or whether it also modified “failed to care for or support.” The court had previously held that it modifies both.

The court then looked to whether the evidence presented at the hearing established that the father’s lack of support was willful. The court found that the analysis at the lower court level was enough to establish that his failure to support the child was willful. The court sustained the ruling of the lower court.

ATTORNEY FEES - EXTRAORDINARY FEES

TOPIC: **Probate court abused its discretion by summarily denying a motion for extraordinary fees and not engaging in a complete review of the need for them. Court must elucidate reasonable and ordinary fees before dismissing request for extraordinary fees.**

TITLE: **Estate of Brunger, 2018-Ohio-4474**
COURT: **Court of Appeals of Ohio, Eleventh District**
COUNTY: **Portage County**
DATE: **November 5, 2018**

In 2017, appellant filed a motion for extraordinary attorney fees and an application for estate attorney fees. Attached to the motion and application was an itemized fee bill detailing the dates and types of services provided to the estate and the hourly rate for those services. Simultaneously, each beneficiary of the estate filed a “consent to payment of attorney fees outside court guidelines.” Accompanying these documents was a final account, receipts, and disbursements.

The probate court summarily denied the appellant’s motion for extraordinary fees, without holding a hearing, finding that the attorney’s fees as requested were not extraordinary. Appellant appealed the ruling.

On appeal, appellant argued that the probate court abused its discretion by denying her motion without first holding a hearing. Appellant pointed to the Portage County Probate Court Local Rules which, she argued, required the court to hold a hearing on her request for extraordinary fees.

The court did not agree, explaining that, when read together, the local rules simply provide that it is within the probate court’s discretion to hold a hearing on any application for attorney fees, even when the beneficiaries have given consent. Here, even though the beneficiaries had all given their consent, the probate court still had discretion to determine whether to hold a hearing on the matter.

The appellate court explained that the trial court’s decision not to hold a hearing would be reversible error only if it constituted an abuse of its discretion. The court held that the probate

court's decision was not an abuse of discretion namely because the appellant did not request a hearing in her motion for extraordinary fees.

Appellant also argued that the probate court's denial of her motion, based on its determination that the requested fees were not extraordinary, constituted an abuse of discretion because the court did not determine whether those fees were necessary and reasonable.

On this point, the court agreed, holding that the denial of appellant's motion without determining the reasonable value of legal services provided by appellant to the estate was an abuse of discretion.

The court explained, that when a request for extraordinary fees is made, the court must review both ordinary and extraordinary services claimed to have been rendered and determine if the fees payable exceed the reasonable value of ordinary services rendered such to necessitate an adjustment for allowances made for extraordinary services.

Here, the probate court summarily denied the request for extraordinary fees, stating, without analysis or discussion, that "the fees requested are not extraordinary." Because of the court's lack of analysis, it was impossible to determine whether the court had actually engaged in such a review. Because it was impossible to make such a determination, the trial court's denial of the motion, without explanation, constituted an abuse of discretion.

CHARITABLE TRUSTS - CY PRES

TOPIC: Court ordered trust distribution to a not for profit versus a for profit successor hospital. A court may apply the doctrine of *cy pres* when a charitable trust must be modified in order to distribute the funds in accordance with the donor's charitable intent.

TITLE: FirstMerit Bank, N.A. v. Akron General Medical Center, 2018-Ohio-2689
COURT: Court of Appeals of Ohio, Fifth District
COUNTY: Stark County
DATE: July 9, 2018

Before her death, the donor established a trust and named "Massillon Community Hospital, its successors or assigns" as a beneficiary. At the time she established the trust, Massillon Community Hospital was being operated as a not for profit hospital. First Merit Bank was named as the trustee of the trust.

Prior to the income being disbursed, Akron General Medical Center bought Massillon Community Hospital and began running a for-profit hospital. Upon the death of the donor, First Merit filed an action seeking a declaratory judgment as to whom the disbursement should be made.

Akron General Hospital, argued that the trust left the money to Massillon Community Hospital's successor, which they were, so they were entitled to the trust income.

The trustee argued that because at the time the donor established the trust, Massillon Community Hospital was a not for profit hospital it would be inappropriate to now disburse the money to a for profit hospital. It argued that because the donor's charitable intent could no longer be carried out, the court should apply the doctrine of *cy pres* and order that the proceeds of the trust be distributed to another charitable organization.

The *cy pres* doctrine is a rule of construction by which charitable gifts are preserved for the public benefit. It is used by courts of equity to effectuate the intention of a charitable donor when it has become impossible to give literal effect to the donor's intention.

The common-law doctrine of *cy pres* has been codified at R.C. 5804.13 which provides, that if a charitable purpose becomes impossible to achieve, the trust does not fail, the trust property does not revert to the settlor, and the court may apply *cy pres* to modify the trust and direct that the trust property be distributed in a manner consistent with the settlor's charitable purposes. The official comment to the statute states that the statute presumes the settlor had a general charitable intent.

The probate court agreed with the trustee, and awarded the proceeds of the trust to the Health Foundation of Greater Massillon and the Massillon Rotary Foundation Trust. Akron General appealed the probate court's ruling, and argued that the probate court should not have applied the *cy pres* doctrine.

Looking at the trust language, the appellate court agreed with the probate court and found that the donor had a charitable intent that could no longer be carried out and that the probate court did not err in applying the doctrine of *cy pres* to distribute the trust property in accordance with the donor's intention.

ESTATES

TOPIC: **Removal of Executor upheld. Probate court did not abuse its discretion when it removed an executor who failed to collect rental income he owed to the trust.**

TITLE: **In re Estate of Hamad, 2018-Ohio-4980**
COURT: **Court of Appeals of Ohio, Ninth District**
COUNTY: **Summit County**
DATE: **December 12, 2018**

The decedent, Hamad, executed a will, which named Charles Hamad, his son, as the executor of the estate. Among other things, the will provided that Hamad Tire, Inc., a business owned by the decedent, would be divided between three of the decedent's six children and that the property on which the business operated would be transferred into a trust.

As part of the decedent's estate plan, Hamad Tire was required to pay monthly rent to the trust for the company's use of the property. The trust provided that the income derived from the rent of the property would be divided equally between the decedent's six children.

Over time, Charles Hamad, the executor, bought his siblings' shares of Hamad Tire, and became the owner outright. This meant that Charles Hamad, as the owner of Hamad Tire, was responsible for paying rent to the trust and that rent was to be distributed among all six of the decedent's children.

Charles Hamad failed to collect the income and remit it to the trust. The matter ultimately went to a hearing on a motion to remove Charles as executor and to strike the final accounting of the estate.

Following the hearing, the probate court removed Charles as executor and refused to accept the final accounting of the estate because it failed to account for the rent that should have been paid to the trust. Charles appealed.

Charles argued that the trial court erred in removing him as executor because he claimed the court had no statutory authority to do so.

Under R.C. 2113.18(A) the probate court is authorized to remove an executor if there are unsettled claims existing between the executor and the estate that the court thinks may be the subject of controversy or litigation between the executor and the estate.

Here, Charles and the other beneficiaries of the trust had been litigating over the unpaid rental income for nearly four years. Furthermore, Charles Hamad was in a peculiar situation, being the owner of the business and the estate fiduciary. The trial court could therefore reasonably conclude that there were unsettled claims between Charles and the estate that could become the subject of litigation.

Finding the requisite statutory authority, the court went on to review the removal of Charles under an abuse of discretion standard. Charles, as executor, had the responsibility to safeguard all of the decedent's assets, including the real estate and the trust. He was required to manage and protect the value of the real estate, which included collecting any rents owed on the real estate. Because of his failure to adhere to the proper duties he owed to the estate as the executor, the probate court did not abuse its discretion when it removed him from that position.

TOPIC: **When there exists a fiduciary relationship, even as between a father and daughter, the court should apply a presumption of undue influence, rather than the family gift presumption on transfers of property.**

TITLE: **Martin v. Steiner, 2018-Ohio-3928**
COURT: **Court of Appeals of Ohio, Ninth District**
COUNTY: **Wayne County**
DATE: **September 28, 2018**

In 1998, the father of both parties signed a power of attorney appointing the daughter, Sandra Steiner, appellee, as his attorney in fact. Before his death, the father signed a survivorship deed conveying his farm to himself and his daughter for their joint lives, with the remainder to the survivor of them. After the father passed away, Sandra was named fiduciary of the estate. Later, she executed a deed conveying the farm to herself and her husband.

Her brother, William Martin, appellant, filed a complaint for declaratory judgment, seeking to have both of the deeds declared void based on lack of consideration, undue influence, violation of fiduciary duty, and because the deed was not prepared by the grantor.

At the lower court level, the court applied the family gift presumption to the transfer of property. On appeal, William argued that the trial court erred by failing to find that the daughter had a fiduciary relationship with the father. He argued that the trial court should have applied a presumption of undue influence because, by virtue of the power of attorney, a fiduciary duty was created.

The appeals court agreed with William, finding that the trial court erred in applying the family gift presumption rather than a presumption of undue influence.

The court explained that although there is a general presumption that the transfer of assets between family members is a gift, where the family members are also in a fiduciary relationship, the family gift presumption yields to the more specific presumption of undue influence that arises in fiduciary relationships.

The power of attorney created a fiduciary relationship between the principal, in this case the father and the attorney in fact, in this case the daughter. Consequently, any transfer of property from the father to the daughter should be viewed with some suspicion that there may have been undue influence. The burden was therefore on the daughter to show, by a preponderance of the evidence, that the gift was free from undue influence.

The court held that the trial court erred in failing to apply this presumption of undue influence, and failing to require the daughter to meet the requisite burden of proof.

TOPIC: A never divorced spouse cannot claim to be spouse in an estate when she waived property rights in a prior marriage and divorce case. Trial Court abused its discretion by entering a judgement which would allow for an impermissible collateral attack on a prior divorce decree.

TITLE: In re Estate of Lewis, 2018-Ohio-3832
COURT: Court of Appeals of Ohio, Ninth District
COUNTY: Medina County
DATE: September 24, 2018

Michael Lewis died on December 10, 2015. Mr. Lewis executed a will in 2014, which provided that all of his property should pass to “my wife, Christina Lewis.”

Three days after Lewis’ death, an attorney filed an application for authority to administer his estate that listed an Ellen McCoy as the surviving spouse and stated that Mr. Lewis died intestate. Six months later, Christina Lewis filed an application to admit Lewis’ will to probate with her as surviving spouse.

The trial court set the matter for a hearing to determine the identity of Lewis’ surviving spouse. Christina testified that she married Lewis in 2008 and remained married to him until his death. She also testified that Lewis had subsequently married a Carolyn Lewis, but that they were divorced.

Ms. McCoy testified that she married to Lewis in 2008 and that she had never initiated divorce proceedings against him. She further testified that she was aware of the subsequent Carolyn Lewis marriage and divorce but had not done more than provide an affidavit that she did not divorce Lewis.

The Magistrate found that since Ms. McCoy had never initiated divorce proceedings against Lewis, the subsequent marriage to Christina was invalid. The trial court adopted the Magistrate’s decision and concluded that Ms. McCoy was Lewis’ surviving spouse.

Christina argues that the trial court abused its discretion by determining that Ms. McCoy is Lewis’ surviving spouse because the effect of the trial court’s judgment is to permit Ms. McCoy to mount a collateral attack against the divorce decree between Lewis and Carolyn Lewis. A collateral attack against a divorce decree cannot be made by challenging a party’s status as surviving spouse in the context of a probate action.

Ms. McCoy testified that at the time of Lewis’ divorce from Carolyn, she did not want to participate in the divorce action, and she did not think that she was entitled to any of the assets at issue. Ms. McCoy, therefore, effectively disclaimed her property rights as Lewis’ spouse by failing to assert them in the divorce action despite having notice of those proceedings.

The Court concluded that Ms. McCoy’s attempt upon Lewis’ death to assert rights as a surviving spouse constituted an impermissible collateral attack on the judgment of divorce between Lewis and Carolyn. The trial court abused its discretion by concluding that Ms. McCoy is Lewis’ surviving spouse.

TOPIC: Ohio law recognizes *in terrorem* provisions in a will/trust as valid and strictly enforces them without regard to exceptions of good faith and probable cause.

TITLE: Simmonds v. Ward, 2017 CV 134
COURT: Court of Common Pleas - Probate Court
COUNTY: Summit County
DATE: December 13, 2018

Plaintiff, George Simmonds, is the grandson and only living heir of the Decedent, Dorothy Kates. Decedent executed the Dorothy Kates Revocable Living Trust on September 9, 2009. The Trust contained three *in terrorem* provisions regarding a beneficiary's challenge to the Trust or the Trust's provisions. The *in terrorem* clauses provided that any beneficiary to challenge the Trust provisions or asset distributions would be treated as if he/she predeceased the distribution of the estate without surviving issue.

Dorothy executed several versions of the Trust, each with the provisions but naming different beneficiaries. The final version named Simmonds and a long time care giver, Connie Ward.

After Decedent's death, the Plaintiff filed a complaint alleging Undue Influence and Misappropriation of Assets under O.R.C. § 2109.50. The Plaintiff alleged that Connie Ward unduly influenced Decedent into creating a bequest for herself. The Plaintiff requested that the court deem the provision granting a bequest to Connie Ward or her descendants null and void.

The Defendants filed a Motion for Summary Judgment to enforce the *in terrorem* clause. Plaintiff admitted that he knew of the *in terrorem* clauses.

The court held that by filing the action against the estate, Plaintiff knowingly violated the *in terrorem* provision in Decedent's Trust. Ohio law recognizes *in terrorem* provisions as valid and strictly enforces them without regard to exceptions of good faith and probable cause.

TOPIC: A court with jurisdiction over the parties in a will/trust case can validly issue a decree directing a party to convey land located in another country.

TITLE: Kanarios v. Kanarios, 2018 CV 0112
COURT: Court of Common Pleas - Probate Court
COUNTY: Summit County
DATE: December 20, 2018

Decedent executed his Last Will and Testament and the Konstantinos Kanarios Trust on June 26, 1992. The will is a pour over will and directs the co-executors to transfer the residue of his estate into the Trust. At the time of his death, Konstantinos, a resident of Summit County, owned several pieces of real property located in Greece.

Plaintiff, Angelo Kanarios, filed a complaint seeking a declaratory judgment and an accounting in connection with real property located in Greece. Plaintiff requested that the court declare that the co-executors of the estate have a duty and obligation to convey all real property in Greece owned by Konstantinos at the time of his death into the Trust.

Defendant, Aliko Kanarios, filed a Motion to Dismiss, pursuant to Ohio Rule of Civil Procedure 12(B), for lack of subject matter jurisdiction, improper venue, and failure to state a claim upon which relief may be granted. Defendant claimed that the Summit County Probate Court lacked jurisdiction to exercise control over real property located in another county and that the co-executor and trustee are without power to exercise the relief requested by Plaintiff.

In determining whether a declaratory judgment action is properly before the probate court, the court must decide whether the matter relates to the administration of an estate. Citing district court case law, the court explained that a court's jurisdiction is complete only when the subject matter of the action, and the parties to the action, are both properly before the court. The subject matter of an action depends on whether the action is *in rem* (dealing with property) or *in personam* (directed against the person).

The Ohio Supreme Court has distinguished between an *in personam* order to compel parties before it to convey property and an *in rem* decree, which itself operates as a conveyance. The Ohio Supreme Court has held that a court with *in personam* jurisdiction over the parties can validly issue a decree directing a party to convey land located in another jurisdiction. Here, the dispute is based on a will and trust created and administered in Ohio. Since R.C. 2101.24(A) vests the probate court with exclusive jurisdiction to direct and control the conduct of executors, the probate court has jurisdiction over the persons in this action and the power to enforce a remedy upon those persons. The property in Greece directly relates to the administration of the decedent's estate. Therefore, the court has *in personam* jurisdiction over the parties and subject matter jurisdiction over the Ohio trust, will, and fiduciaries.

The court also denied the Motion to Dismiss for lack of venue claim. The court reasoned that venue is a procedural tool used to determine which probate court is the most convenient or proper court. Civ. R.3(C) provides that venue is proper in the county in which the Defendant resides, the Defendant conducted activities that gave rise to the claim, or in which the executor was appointed. The court held that venue was proper because Summit County is where the Defendant resided, the will was probated, and the co-executors were appointed.

Finally, the court dismissed the Motion to Dismiss for failure to state a claim upon which relief may be granted. Plaintiff asserted that he requested an accounting from Defendants and but was not provided with one. The court stated that the Plaintiffs have pled sufficient facts in support of the claim and the court has the authority, if proven, to effectuate their requested relief.

GUARDIANSHIP

TOPIC: **Probate Court had jurisdiction over a proposed ward because the ward had established a legal settlement in the county when he traveled to Ohio on a one-way ticket, changed the address on his federal social security benefits, and granted his daughter rights under a durable power of attorney.**

TITLE: **In re Guardianship of Chieu, 2018-Ohio-4937**

COURT: **Court of Appeals of Ohio, Twelfth District**

COUNTY: **Butler County**

DATE: **December 10, 2018**

Chieu entered a Buddhist temple in Seattle, Washington, where he planned to live until his death. However, he was diagnosed with dementia and his health began to decline.

Nguyen, Chieu's daughter, traveled to Seattle to visit her father. During that visit, Chieu named her his agent and guardian through a durable Power of Attorney. Chieu then moved to West Chester, Ohio into his daughter's home so that she could care for him. She obtained social security benefits for him in Ohio.

Nguyen then moved for guardianship of Chieu. A court investigator interviewed Chieu regarding the petition, and issued a report indicating that Chieu did in fact reside in West Chester, that he consented to the guardianship, and that he was incompetent based on his dementia. The court accepted the petition and granted guardianship to Nguyen.

Several months later, other members of Chieu's family filed a motion to dismiss the appointment of Nguyen as guardian for lack of jurisdiction. The court appointed Chieu counsel and his counsel also moved the court to dismiss for lack of jurisdiction. The court denied both motions. Chieu appealed.

Chieu argued that the probate court lacked subject matter and personal jurisdiction to appoint Nguyen guardian. Pursuant to R.C. 2111.02(A), a probate court may appoint a guardian provided the person for whom the guardian is to be appointed is a resident of the county or has a legal settlement in the county. Residence requires the actual physical presence at some abode coupled with an intent to remain at that place for some period of time. A legal settlement connotes living in an area with some degree of permanency greater than a visit lasting a few days or weeks.

The record indicated that at the time Nguyen was appointed guardian, Chieu had left Seattle on a one way plane ticket, and settled in his daughter's home in a manner that resembled an ongoing stay, rather than just a short visit.

The court, therefore, found in favor of the appointment and upheld the ruling of the lower court.

TOPIC: Designation as a financial power of attorney alone does not entitle one to notice of hearing on a guardianship application.

TITLE: In re Guardianship of Rosenberger, 2018-Ohio-3533

COURT: Court of Appeals of Ohio, Eleventh District

COUNTY: Lake County

DATE: September 4, 2018

In 2016, Susan Doudican filed an Application for Appointment of Guardian of Alleged Incompetent on behalf of her half-sister, Norma Rosenberger. In 2017, a magistrate's decision was issued finding that Norma Rosenberger was mentally impaired and incapable of independently caring for her person and safeguarding her income and assets. The magistrate

recommended that Doudican be appointed the guardian of the person and the guardian of the estate of Norma Rosenberger. The probate court adopted the magistrate's decision.

During the hearing on the guardianship, the evidence established that in early 2016, Ms. Rosenberger's mental stability began to decline while she was living alone in Washington State. During that time, Ms. Rosenberger hired Northwest Trustee and Management Service for financial services naming them as agent under a durable general power of attorney agreement. After the probate court adopted the magistrate's decision, Northwest Trustee and Management Service filed a Motion to Intervene.

Northwest argued that in her financial durable power of attorney, Ms. Rosenberger named Northwest as agent, and instructed any court that acted upon a guardianship application to deny the application as long as the agent was acting under the power of attorney. But if she needed a guardian another part of that agreement, nominated Northwest to serve as a guardian.

Further, Northwest argued that they were an interested party, necessary for the adjudication of Ms. Rosenberger's rights, and they had not received proper notice of the guardianship application, or the hearing, and were therefore deprived of the opportunity to assert their rights. The probate court denied Northwest's motion to intervene. Northwest appealed.

Northwest claimed it was entitled to intervene as an interested party and by not receiving notice of the guardianship proceedings its right to due process was violated. The court agreed that Northwest's status as Ms. Rosenberger's power of attorney did make them an interested party, until the POA was expressly terminated, however the court went on to hold that that status did not entitle Northwest to notice of the hearing under R.C. 2111.04.

R.C. 2111.04 requires notice to be served "upon the person for whom appointment is sought, and upon the next of kin" and no one else.

TOPIC: Where claims arise before the establishment of a guardianship, RC 2101.24 does not vest the probate court with exclusive jurisdiction over claims made against a ward.

TITLE: Sosnoswsky v. Koscianski, 2018-Ohio-3045

COURT: Court of Appeals of Ohio, Eighth District

COUNTY: Cuyahoga County

DATE: August 2, 2018

Sosnoswsky, the plaintiff, filed two virtually identical complaints at the same time, one in the probate division and one in the general division. Each alleged that due to a trustee's fraudulent conveyance of trust funds, the plaintiff never received the trust money to which she was entitled,

The trustee was the plaintiff's mother who was also a ward of the probate court. The complaints did not name the mother trustee as a party, but did name the trustee's guardian, Koscianski, as the defendant.

The allegations in the complaints dealt solely with the ward's actions which took place prior to the guardianship. The complaint did not call into question the conduct of the defendant, as the guardian.

The general division granted the guardian's motion to dismiss for lack of subject matter jurisdiction, holding that the probate court had exclusive jurisdiction for all matters arising under R.C. 2101.24. Sosnoswsky appealed the general division's ruling.

The appellate court found for Sosnoswsky, holding that R.C. 2101.24 does not provide for jurisdiction over claims made against a ward for conduct occurring prior to the guardianship. The court explained, the probate court only has exclusive jurisdiction to direct and control the conduct and settle the accounts of executors, guardians, conservators, testamentary trustees, and fiduciaries. The probate court, under the statute, does not have exclusive jurisdiction over actions perpetrated by the ward.

Because this case involved actions taken by the ward prior to the appointment of a guardian, the probate court did not have exclusive jurisdiction and the general division was incorrect in dismissing the case for lack of jurisdiction.

TOPIC: R.C. 2111.04 prohibits gifts by an alleged incompetent during the pendency of a guardianship proceeding. However it does not prohibit gifts made by the alleged incompetent of trust assets, in his role as trustee,

TITLE: Weinberg v. Weinberg, 2018-Ohio-2862
COURT: Court of Appeals of Ohio, Second District
COUNTY: Montgomery County
DATE: July 20, 2018

An attorney applied to be appointed as guardian of Weinberg. The application included a statement of expert evaluation, which indicated that Mr. Weinberg was suffering from Alzheimer's type dementia and concluded that his condition would not improve.

Prior to his dementia, Weinberg executed a trust for the benefit of his spouse and children. He served as trustee until his death. While the application for guardianship was still pending, Mr. Weinberg, as trustee, executed a series of four assignments on behalf of the trust, by which the trust's interests in four Michigan based limited partnerships were to transfer to his daughter upon his death.

The son filed a complaint challenging the validity of those assignments. The son challenged the assignments on three grounds, the most relevant here being that the assignments were invalid as a matter of law pursuant to R.C. 211.04(D). The probate court dismissed the son's cause of action and he appealed.

On appeal, the son argued that because the daughter had notice of her father's impending guardianship proceeding during the time that the assignments were executed, they were per se invalid under R.C. 2111.04(D). The court disagreed.

R.C. 2111.04(D) prohibits gifts to be made by an alleged incompetent during the pendency of a hearing for competency. In this case, the assignment stated "for value received the Sylvan Weinberg Revocable Trust does hereby sell, assign, and transfer unto Appellee a certain interest in one of four Michigan based limited partnerships."

The court held that because the assignments were for partnership interests that were not in the name of the alleged incompetent, but rather were in the name of the trust, the prohibition in R.C. 2111.04(D) did not apply. Because the interests central to this action were not owned by the alleged incompetent, the gifts were valid.

INTER-VIVOS GIFT

TOPIC: **Husband deeding one half interest in property to his wife, as trustee of her own individual trust, for the purpose of pooling assets, constitutes donative intent such to sustain a finding that the transfer was an inter vivos gift.**

TITLE: **Nethers v. Nethers, 2018-Ohio-4085**
COURT: **Court of Appeals of Ohio, Fifth District**
COUNTY: **Guernsey County**
DATE: **October 05, 2018**

In 2012, husband and wife each executed a revocable living trust. Husband is the settlor and trustee of his trust, wife is the settlor and trustee of her trust. The initial funding of each trust included an undivided one-half interest in three properties. The husband executed warranty deeds in 2012, transferring an undivided one-half interest in the real properties to wife as trustee of her trust.

The parties filed for divorce in 2017. At the divorce hearing, the Magistrate granted the divorce, divided the parties' assets and liabilities, and ordered the parties to revoke their trusts to facilitate the division of the assets.

On appeal, the husband argued that the trial court was incorrect to classify the property transfer as an inter vivos gift. The husband explained that the property transfer was part of an estate plan, with the intention being to pool their marital assets and avoid probate upon their death. The court held that the Husband relinquished ownership and control over the property interest given to his wife, and by conveying a present possessory interest in the property it was in fact an inter vivos gift.

The court explained that while part of the intent of the transfer was for estate planning reasons, specifically to “avoid probate,” the other intent of the transfer was to make a gift presently in order to “pool assets.” Because of this donative intention and the present relinquishment of ownership, the transfer was correctly classified as a inter vivos gift.

PROCEDURE

SERVICE OF PROCESS

TOPIC: **Personal service was not sufficient when the process server identified himself to the defendant as she ran back into her house and he simply left the paperwork in the doorway rather than hand it to her. Tender does not equal delivery**

TITLE: **Beaver v. Beaver, 2018-Ohio-4460**
COURT: **Court of Appeals of Ohio, Fourth District**
COUNTY: **Pickaway County**
DATE: **October 29, 2018**

Mr. Beaver filed a complaint for divorce in November 2017. In December, Ms. Beaver filed a motion to dismiss for insufficient service of process.

According to the court, personal service was not effected pursuant to Civ.R. 41(C) because the complaint and summons was not left with any person at the residence, but was placed in the front storm door. The court held that because the process server left the paperwork in the door and did not hand it to anyone at the residence, service was not perfected.

On appeal, Mr. Beaver argued that the trial court erred in finding that the process server failed to personally serve Ms. Beaver. He argued that the language in the rule, which states that the process server “shall tender a copy of the process and accompanying documents to the person to be served” does not require the process server to hand the paperwork to the person being served, touch the person to be served, or to have any physical contact with the person to be served. The court disagreed with Mr. Beaver, holding that in this case, the process server had failed to perfect service because he had failed to deliver the paperwork such that Ms. Beaver retained possession or control over it.

The court explained that while their review of the case law indicated that the interpretation of personal service is not clear and that the outcomes in cases are driven by the facts, the case law does make clear that the definition of personal service includes an aspect of delivery; however, *hand* delivery is not required in every instance.

According to the court, delivery is the act by which the substance is placed within the actual or constructive possession or control of another; while, tender is the action of presenting an object for acceptance.

Here, the process server testified that when he attempted to serve Ms. Beaver on the sidewalk in front of her home, she ran back into her house and locked the door behind her. The process server testified that he left the paperwork between the storm door and the house door. Ms. Beaver testified that the process server scared her by approaching her at night on the street, she admitted to running away from him and she stated that she never picked up the paperwork left in the doorway, she simply left it on the ground.

According to the court, while the process server did *tender* the paperwork, he failed to *deliver* the paperwork such that Ms. Beaver retained possession or control. Therefore, the court agreed with the lower court that personal service was not perfected and the case was properly dismissed.

TOPIC: The defendant did not rebut the presumption that he was properly served, as he was not credible and was unable to provide any corroboration for his claims that he did not live at the address to which service was sent. It is up to the trial court to determine the credibility of witness testimony.

TITLE: Discover Bank v. Wells, 2018-Ohio-4637
COURT: Court of Appeals of Ohio, Second District
COUNTY: Clark County
DATE: November 16, 2018

Susan Paul was the holder of a Discover Bank credit card prior to her 1992 marriage to John Wells. During the marriage, both parties made charges to the account. The parties were divorced in 1996. The judgment and decree of divorce made Wells responsible for payment of the Discover credit card debt existing at the time of the divorce.

In 2003, Discover filed a complaint seeking payment of the debt due on the credit card account. Default judgment was rendered against both Paul and Wells, jointly and severally. Discover made attempts to collect on the judgment by initiating garnishment proceedings.

In 2017, both Paul and Wells filed Civ.R. 60(B) motions to set aside the default judgments. A hearing was conducted during which Wells testified that, after the divorce, he continued to live at the marital residence.

The court overruled both motions to set aside the judgement. On appeal, Wells argues that Discover failed to perfect service on him when it initiated the lawsuit, thus rendering the default judgment void. The court declined to agree with Wells, holding that the lower court did not err in discrediting Wells' self-serving testimony and denying the motion to set aside the judgement.

If process was sent to a defendant by mail, at the defendant's correct address, and the defendant claimed he did not receive it, the court must hold a hearing to determine the issue. Upon holding such a hearing, it was up to the court to determine whether the defendant's own self-serving testimony was credible.

In this case, the record demonstrated that when Discover initiated the lawsuit, it attempted service via certified mail to the parties' marital residence. The certified mail notices were returned as unclaimed. Thereafter, as provided by the rules, Discover filed a request for ordinary mail service, which was granted. The ordinary mail envelope was not returned by the post office with an endorsement showing failure of delivery.

Wells claimed that he was not served because he did not reside at the parties' residence in 2003. However, after holding a hearing, the trial court found Wells testimony to be lacking in credibility and insufficient to overcome the presumption of service.

Appeals courts will not substitute its judgement for that of the trier of fact on the issue of witness credibility unless it is patently apparent that the trier of fact lost its way in arriving at its verdict.

The court held that the testimony was clear that Wells was unsure of exactly when he moved out of the parties' residence, and he did not provide any corroborating evidence to substantiate his claim that he had moved prior to 2003. Therefor the lower court did not err in discrediting Wells' testimony and denying the motion to void the default judgement.

TOPIC: Notification by publication is proper when reasonable due diligence is employed to attempt to perfect service by certified mail. Whether a party's efforts constitute reasonable due diligence will depend on the facts of the case. Reasonable due diligence found when Appellees conducted an exhaustive public records search for heirs.

TITLE: Sharp v. Miller, 2018-Ohio-4740
COURT: Court of Appeals of Ohio, Seventh District
COUNTY: Jefferson County
DATE: November 26, 2018

This appeal is from an oil and gas case and involved the ownership of mineral interests in Springfield Township, Jefferson County. The property at issue here was originally owned by Poole and Smith (original owners). In 1944, they transferred the rights to the surface, while retaining mineral interests in the property using language in the deed.

In 2014, the Millers, appellees, filed a notice of intent to declare the mineral interest abandoned because they could not locate the names or addresses of any of the original owners, or their heirs. They filed the notice by publication. The Sharps, appellants, argued that the Millers did not use reasonable diligence when researching potential heirs, making service by publication improper.

The Dormant Mineral Act (ORC 5301.56) allows notice by publication when notice cannot be completed through certified mail. An attempt to provide notice by certified mail is unnecessary where a reasonable search fails to reveal the names or addresses of potential heirs who must be served.

The Sharps asked the court to determine the extent of the efforts required to satisfy reasonable due diligence in locating heirs before service by publication is proper. The court held that whether a party's efforts constitute due diligence depends on the facts and circumstances of each individual case.

In this case, the Millers searched probate and deed records, and were unable to locate any heirs. In fact, the original owner's probate records did not refer to the mineral interests. A title report also failed to reveal any potential heirs. Finally, they conducted an online search using paid subscription services, like ancestry.com, world vital records, and MyHeritage.com and visited the Carroll County Genealogical Society. Still, they were unable to locate any heirs.

Due to these facts, the court found that their exhaustive public record search constituted reasonable due diligence such that notice by publication was proper.

FRIVOLOUS CONDUCT

TOPIC: **A trial court abuses its discretion when it arbitrarily denies a hearing on a motion for sanctions if the record clearly shows frivolous conduct, or if the record establishes that there is an arguable basis for an award of sanctions.**

TITLE: **Ditech Financial LLC vs. Kudroff, 2018-Ohio-4422**

COURT: **Court of Appeals of Ohio, Eighth District**

COUNTY: **Cuyahoga County**

DATE: **November 1, 2018**

In 2017, Ditech brought a foreclosure action against Kudroff and his corporation. Ditech alleged that Kudroff was in default of their mortgage obligations and owed them money. Ditech eventually moved the trial court to dismiss the complaint, without prejudice, because it "accepted sufficient funds to resolve the parties' present dispute." The trial court granted the motion to dismiss.

One month later, the defendant Kudroff filed a motion for sanctions against Ditech and requested a hearing pursuant to R.C. 2323.51. The trial court, without holding a hearing, denied Kudroff's motion for sanctions, finding that Ditech's conduct was not "frivolous or egregious in bringing the foreclosure action." Kudroff appealed.

On appeal, the court found in favor of Kudroff, holding that the lower court should have held a hearing on the matter before dismissing it entirely.

Generally the trial court is not required to hold a hearing before denying a motion for sanctions. However, the eighth district has found that a trial court does in fact abuse its discretion when it arbitrarily denies a hearing on a motion for sanctions if either, the record clearly shows frivolous conduct or at least an arguable basis exists for an award of sanctions.

Here, the court found that the record showed that Kudroff had had established an arguable basis for awarding sanctions. Kudroff established this basis by alleging that Ditech wrongfully and without justification declared them to be in default of their mortgage obligations, when in fact they did make those payments.

FINAL APPEALABLE ORDER

TOPIC: **Entry overruling a motion for reconsideration for payment of funeral bill does not constitute a final appealable order such to vest jurisdiction with the appeals court.**

TITLE: **Estate of Weaver, 2018-Ohio-4204**
COURT: **Court of Appeals of Ohio, Fourth District**
COUNTY: **Pickaway County**
DATE: **October 15, 2018**

Mr. Weaver died in 2017 and an estate was opened naming Mr. Williams as the executor. Mr. Lovensheimer filed a claim against the estate for costs associated with the funeral.

Mr. Williams filed a motion to strike the claim against the estate, arguing that the claim had previously been presented and rejected by the estate thereby requiring Mr. Lovensheimer to bring an action in the court of common pleas. Mr. Williams argued that because Mr. Lovensheimer had not filed the action against the estate within two months of the claim being rejected, the claim should be stricken from the record.

The probate court issued an entry overruling the motion to strike the claim. The court quoted a letter from counsel to Mr. Lovensheimer and found that there was no plain and unequivocal statement that the claim was rejected.

Mr. Williams filed a motion for reconsideration. The court issued an entry overruling the motion for reconsideration, which included the language “there is no just cause for delay.” Mr. Williams appealed the entry overruling the motion for reconsideration.

Before addressing the merits of the appeal, the appeals court directed Mr. Williams to brief the issue of whether the entry overruling the motion for reconsideration constituted a final appealable order such to vest jurisdiction in the appeals court.

Probate court matters, or matters related to estate administration, are typically characterized as special proceedings. Substantial right is a right that is protected by the law. An order that affects a substantial right is one which, if not immediately appealable, appropriate relief would be foreclosed in the future. There must be virtually no future opportunity to provide relief from the prejudicial order.

The court found that none of the entries at issue in this case affects a substantial right of Mr. Williams, or the estate, in that they did not determine whether the estate was liable. As a result, the court did not have jurisdiction to hear the case and it was remanded.

TOPIC: **A default judgment, which removed an individual as trustee immediately, but deferred the determination of attorney fees and required an accounting at a later date, was not a final appealable order because it did not determine the action and left unresolved issues.**

TITLE: **Ford v. Chamberlin, 2018-Ohio-4007**
COURT: **Court of Appeals of Ohio, Fourth District**
COUNTY: **Scioto County**
DATE: **September 26, 2018**

Appellee, Victoria Ford filed a complaint for declaratory judgment to remove Appellant, Brian Chamberlin as trustee of an inter vivos trust created by her mother. Ford alleged that Chamberlin had violated his fiduciary duties, and she sought an order removing him as trustee, and to require Chamberlin to provide an accounting of the trust assets.

Chamberlin failed to answer the complaint, so Ford filed a motion for default judgment. The court granted default judgment, finding that Chamberlin had been properly served but failed to answer. The order granted a default judgment to Ford, ordered Chamberlin to file a full and complete accounting within 30 days, and enjoined him from acting as trustee. Appellant Brian Chamberlin appealed this judgement.

Before addressing the merits of the appeal, the court ordered Chamberlin to address whether the trial court had in fact entered a final appealable order. Chamberlin argued that the order was final and appealable under R.C. 2505.02(B)(1) because it affected a substantial right and that it in effect, determined the action and prevented a future judgment. Ford argued that the order was not final because the court ordered an accounting and deferred the determination of attorney fees, leaving unresolved issues. The court agreed with Ford, finding that because the order left unresolved issues, and because it did not affect a substantial right, the order was not a final and appealable order and the appeals court lacked jurisdiction to hear it.

The court explained, an order is a final appealable order only if the requirements of R.C. 2505.02 are met. Under the statute, an order is final and appealable only if it affects a substantial right during a special proceeding and it determines the action and prevents a future judgement.

The court noted that while probate court matters are typically characterized as special proceedings, the order in this case did not satisfy the other requirements of the statute. Namely, it

failed to determine the action. The order did not resolve all claims against all parties and left unresolved issues (i.e. the accounting and the fees). In addition, the entry did not affect a substantial right.

Chamberlin had substantial rights to exercise his general powers as trustee, however he failed to demonstrate that those rights were affected. He failed to show that in the absence of immediate review, he would be foreclosed from being reappointed as trustee after a successful appeal from a final judgement.

TOPIC: An absolutely incredible engagement letter

TITLE: Anglin v. Donohoo, 2018-Ohio-4484

COURT: Court of Appeals of Ohio, Twelfth District

COUNTY: Clermont County

DATE: November 05, 2018

Anglin, appellee, as trustee of a trust, filed a complaint against Donohoo, appellant, in the common pleas court asserting claims for breach of contract and fraud. Anglin had retained Donohoo to prepare some tax paperwork for the trust. Donohoo failed to file the requisite tax paperwork, but did in fact bill appellee.

Donohoo filed a motion to dismiss pursuant to Civ.R. 12(B)(6) and 10(D)(1). For his 10(D)(1) claim, Donohoo noted that Anglin had failed to attach important “letters of engagement” to her complaint as required by Civ.R. 10(D)(1). The trial court denied the motion, finding that the remedy for noncompliance with 10(D)(1) was not dismissal.

In accordance with those letters, Donohoo argued, Anglin was barred by the one year statute of limitations that was outlined in the engagement agreement.

Finally, Donohoo filed a motion to dismiss pursuant to Civ.R. 12(B)(6), on the basis that the engagement letters contained an arbitration clause. The trial court converted this motion into a Civ.R. 12(B)(1) motion to dismiss for lack of subject matter jurisdiction.

After recasting the motion as a 12(B)(1) motion, the court found that it could consider the engagement letters in determining its jurisdiction. The court examined the arbitration provision but determined that appellants had waived any right to arbitrate the dispute by failing to timely assert the clause and by participating in the litigation by moving to dismiss.

Donohoo appealed both rulings by the lower court which dismissed both of his motions to dismiss. On appeal, before the court addressed Donohoo’s assignments of error, it looked at whether the judgment entry denying his motions were final appealable orders. Ultimately, the court held that they were not final appealable orders and therefore they lacked jurisdiction to decide the appeal.

The court explained, the Ohio Supreme Court has recognized that generally, an order denying a motion to dismiss is not a final appealable order because a motion to dismiss is a procedural mechanism that simply tests the sufficiency of the allegations of the complaint. Additionally, an order denying a motion to dismiss is not final because it does not determine the action, as the merits have yet to be addressed.

HEARING REQUIRED

TOPIC: Court is required to hold a hearing on competing motions for guardianship and administration of estate. The court's appointment of an administrator and guardian of the estate of several minor children was void because of the court's failure to hold required evidentiary hearing on the dueling applications.

TITLE: In re Guardianship of J.C., 2018-Ohio-4833
COURT: Court of Appeals of Ohio, Fifth District
COUNTY: Perry County
DATE: December 4, 2018

Appellant's four children were in a car accident, three were injured, and one died. Appellant, the mother, filed an application to administer the estate of the deceased child and an application for appointment as guardian of the estates of the living children. The children's paternal grandmother, appellee in this action, filed a competing application for appointment.

The court instructed the parties to file briefs on the legal issues prior to conducting a hearing. The parties did so and, without conducting a hearing, the trial court appointed the grandmother as administrator of the estate of the deceased child, and guardian of the estates of the remaining children. The mother appealed the ruling.

On appeal, the mother argued that the trial court's failure to hold an evidentiary hearing prior to making its ruling was a violation of the applicable statutes and her constitutional rights. The court agreed with the mother, holding that the trial court erred when it appointed the grandmother as administrator without first holding an evidentiary hearing to determine the suitability of the mother.

R.C. 2111.02(C) obligates a trial court to conduct an evidentiary hearing prior to appointing a guardian. However, no hearing was scheduled and instead the court issued a ruling without conducting one.

In her second assignment of error, the mother argued that the lack of a hearing also rendered the trial court's appointment of the grandmother as administrator of the estate of the deceased child void. The court agreed with the mother, finding that the appointment of the grandmother was void.

R.C. 2113.06(A)(2) states that administration of the estate of an intestate shall be granted to the next of kin of the deceased. Here, the parties agree that the mother is next of kin to the decedent, with priority for appointment as administrator. R.C. 2113.06(C) states that if no next of kin is found suitable, the court shall commit the administration to some suitable person. However, the characterization of any applicant as suitable or unsuitable cannot occur without an evidentiary hearing.

Because the court failed to hold such an evidentiary hearing, any order appointing someone that is not the next of kin as administrator is void.

JUDICIAL NOTICE

TOPIC: **The court improperly took judicial notice of a divorce docket in order to establish the amount of child support owed to the decedent's surviving ex-spouse. Judicial notice of another case's docket is only proper when it is used to establish the existence of the other case.**

TITLE: **Pollard v. Elber, 2018-Ohio-4538**
COURT: **Court of Appeals of Ohio, Sixth District**
COUNTY: **Erie County**
DATE: **November 9, 2018**

After the decedent's death, Pollard presented a claim to his estate for costs associated with unpaid child support and fraud related to the transfer of real estate. The estate rejected the claim in full.

Pollard filed a complaint in the trial court alleging that the estate owed her money based on child support that the decedent failed to pay while he was alive. Attached to the complaint were two judgment entries from the Domestic Relations court that were issued in the divorce case in 1974.

Pollard stated in her complaint that she had not received any child support payments from the date of the child support order until the present.

Elber, the executor, filed a motion for summary judgment based on laches, speculative damages, and waiver. In her memorandum of opposition, Pollard argued that Elber's claim of laches was not supported by the facts of the case, that Pollard could calculate her damages and that Elber's waiver argument misconstrued the law.

In her reply, Elber reiterated her original arguments, and asked the court to take judicial notice of the records in the divorce litigation. She also attached five additional judgment entries from the divorce litigation. Pollard objected to the court taking judicial notice of the divorce litigation file.

The trial court granted summary judgment in Elber's favor. The court stated that after taking judicial notice of the filings contained in the divorce proceedings, as well as the docket, Pollard's complaint was barred by laches. Pollard appealed.

On appeal, Pollard argued that the trial court improperly took judicial notice of the file from the divorce litigation. Elber responded that the court did not have to take judicial notice of the divorce litigation because the case was already reopened, which put the divorce case before the court. Alternatively, Elber contended that the trial court properly took notice of the divorce litigation docket. The court agreed with Pollard.

Judicial notice allows a court to accept for purposes of convenience and without requiring a party's proof, a well-known and indisputable fact. A court is not permitted to take judicial notice of proceedings in another case, even a prior proceeding before the same court involving the same parties. A trial court can only take judicial notice of a docket to establish the fact that such litigation exists and is ongoing. Instead, the court used the information contained in the docket sheet to prove the truth of the matters asserted in the probate case pending before it, namely the amount of child support owed to Pollard.

Because the lower court improperly took judicial notice of information from the divorce docket, the court held that the trial court's decision was based on improper evidence.

SUBROGATION

TOPIC: In an asbestos case, the Court did not permit subrogation against workers compensation payments. The R.C. 4123.931(G) penalty provision creates a prohibited taking, and is therefore unconstitutional.

TITLE: General Motors, LLC. V. Anna R. Bolen, 16 CV 0089

COURT: Court of Common Pleas

COUNTY: Henry County

DATE: November 29, 2018

Defendant, Anna Bolen, received four payments totaling \$2,308.42, from Plaintiff, General Motors, subsequent to becoming a statutory claimant in a weekly death benefit. On August 1, 2018, the court granted Plaintiff's Motion for Summary Judgment determining that Plaintiff was entitled to subrogation of those payments made to Defendant.

Plaintiff asserted that having the court grant the relief requested for full repayment of its subrogation interest, including past, present, and estimated future payments of compensation under R.C. 4123.931(G) is constitutional according to Ohio Supreme Court precedence.

The court cited Ohio Supreme Court case law, as well as Section 35, Article II, of the Ohio Constitution, which provides that injured workers, or qualified dependents of injured workers, have a constitutional right to workers' compensation benefits for injuries sustained in the course and scope of their employment. The court held that requiring the recipient of workers' compensation benefits to completely forfeit their past, present and future benefits under R.C.

4123.931(G) is contrary to the Ohio Constitution's guarantee. Requiring Defendant to pay Plaintiff the full amount of the payments received from GM disrupts the rights and obligations of both parties concerning the payment of statutory workers' compensation benefits.

Granting the relief requested by the Plaintiff was also unconstitutional under Article I, Section 19. The court cited the Ohio Supreme Court holding that laws "It must be remembered that neither the state in the passage of general laws, nor the municipality . . . may make any regulations which are unreasonable." *Froelich v. City of Cleveland* [1919], 99 Ohio St. 376, at 391, 124 N.E. 212 [212].

The court also stated that the benefits and compensation paid to the Defendant are protected by Article I, Section 16, of the Ohio Constitution, which provides that every person, for an injury done, "shall have remedy by due course of law." The court held that the statute cannot operate outside its purpose in preventing double recovery in that due process permits deductions for collateral benefits only to the extent that the loss for which the collateral benefit compensates is actually included in the award.