

2024 ESTATE PLANNING AND LAW SYMPOSIUM

May 16, 2024

CASE LAW UPDATE

Presenter

Hon. Laura J. Gallagher

Adoptions

Issue: Adoptions/Sufficiency of Notice
Title: *In re Adoption of M.L.K., 2023-Ohio-3184*
Court: 2nd District, Montgomery County
Date: September 8, 2023

A birth father failed to file his objection to the adoption petition within the 14 days required by R.C. 3107.07(K). Petitioner was granted summary judgment on the issue of consent. Birth father argued that he had not been properly served with notice of the petition, that the 14 day objection period had not begun to run, and that equity required that his objection be deemed timely filed. The appellate court found that the birth father had failed to raise constitutional issues at the trial level; that the birth father had been sent notice complying with R.C. 3107.11; and that service via commercial carrier had been appropriate under Civ.R. 73(E)(3). Appellate court then found that the birth father's self-serving affidavit that he hadn't received raised sufficient issue of fact that summary judgment wasn't appropriate.

Issue: Adoption/Consent/Sufficiency of Notice/Relief from Judgment
Title: *In re Adoption of A.J.W., 2023-Ohio-2609*
Court: 2nd District, Montgomery County
Date: July 28, 2023

Grandparent/custodian adoption. The petitioners served notice of the petition upon the birth father by publication. Probate court found father's consent not necessary after hearing. Petition was granted. More than six months after the final order of adoption was granted, birth father moved for relief from judgment. Appellate court found that the father's objection was not barred by R.C. 3107.16(B), as grandparents did not exercise reasonable diligence in attempting to locate the father before relying on publication. Grandmother admitted that she knew the birth father was incarcerated at the time of publication. Court of appeals reversed the trial court's denial of the request for relief from judgment, and remanded the case for further proceedings.

Issue: Adoption/Consent
Title: *In re Adoption of M.E.W., 2024-Ohio-234*
Court: 9th District, Summit County
Date: January 24, 2024

Stepparent adoption. Biological parents never married, and father granted legal custody. Stepmother moved to adopt and alleged consent not necessary due to lack of communication and lack of support. Magistrate's decision sua sponte found that a birth mother's consent was not required under R.C. 3107.07(K), because the objection to the adoption petition was not timely filed, and that also that she failed without justifiable cause to have more than de minimis contact with the minor and/or provide maintenance and support to the minor for a period of one year before the filing of the adoption petition. The birth mother timely objected to the findings on

contact, support, and justifiable cause, and to the constitutionality of the 14-day time limit to object to an adoption petition. The trial court overruled the objections solely on the basis of the untimely objection under R.C. 3107.07(K), and did not address the constitutionality and evidentiary challenges. The appellate court noted that the objection timely raised the constitutional challenge, and therefore reversed and remanded for further consideration on all the issues raised by the birth mother.

Issue: Adoption/Consent/Justifiable Cause
Title: *In re Adoption of D.W.D.-H., 2023-Ohio-1999*
Court: 2nd District, Clark County
Date: June 16, 2023

A stepparent adoption petition was filed in June 2022. The birth father had provided support for the minor in the past, but only through 2018. Although no support order was ever sought, the birth father had provided the mother a debit card in lieu of formal support; however, the birth father reported that card stolen. The birth father was then incarcerated from February 2021 until June 2022, during which time he arranged for his mother to provide birthday and Christmas gifts for the minor.

The trial court found that the birth father had failed to provide the minor with support for the year prior to the filing of the adoption petition, but found justifiable cause, pointing to the birth father's incarceration during the year prior to the filing of the petition; his past history of providing for the minor; and the court's opinion that there had been a mutual understanding that child support was neither requested nor required.

The appellate court found this decision to be against the manifest weight of the evidence, considering that the birth father had ceased supporting the minor more than two years before he went to prison and failed to provide any support after his release, such that prison did not 'cause' his non-support. The appellate court furthermore found that the evidence did not support that there was a mutual understanding that child support was not requested or required, also noting that the birth father had a statutory obligation to support the minor regardless of the mother's failure to seek a formal support order. The denial of the adoption petition was reversed and remanded for a determination of the minor's best interests.

Issue: Adoption/Consent/Justifiable Cause/Substantial Interference
Title: *In re Adoption of M.R.W., 2023-Ohio-4705*
Court: 3rd District, Crawford County
Date: December 26, 2023

Father filed a motion for establishment of companionship and visitation for child in Juvenile Court. Parties agreed to delay contact between Father and minor until after Mother and Stepfather's marriage. Attorney represented that Mother and Stepfather did not intend to file adoption. Mother and Stepfather married and filed for adoption the first business day after the

wedding. Significant evidence of interference was presented showing the mother had actively prevented the father from having contact with the minor. Probate Court found consent necessary. Stepfather appealed.

Held: Consent was necessary. Justifiable cause for de minimis contact due to Mother's actions in thwarting Father's relationship with child.

Issue: Adoption/Consent
Title: *In re J.H., 2023-Ohio-2477*
Court: 5th District, Tuscarawas County
Date: July 18, 2023

Biological father divorced from children's mother and was later ordered to pay child support. Protection order was granted against father and contact not allowed with children. Father made payments totaling \$120 of \$7,519.08 payments owed. A biological parent's consent to adoption would be required if that parent could show by clear and convincing evidence some justifiable cause for the failure to provide support. Minimal child support payments are not sufficient under the statute. Father's work history and lack of payments undercuts his argument that he was not able to provide maintenance or support.

Issue: Adoption/Consent/Timing of the Lookback Period
Title: *In re Adoption of B.B., 2023-Ohio-4134*
Court: 6th District, Lucas County
Date: November 14, 2023

Stepparent adoption. The stepfather petitioned to adopt the minor on September 27, 2022. His petition stated that the minor had been placed with the stepfather by the mother on July 18, 2020, the date the stepfather and mother were married, but also noted that they had cohabitated since November 2016. The trial court dismissed the filing of the petition, the birth father had provided for the minor's maintenance and support and ha justifiable cause for his failure to have more than de minimis contact with the minor.

The appellate court explained that R.C. 3107.07(A) includes two separate, one-year lookback periods for considering whether a birth parent's consent to adoption is necessary—both the year preceding the filing of the adopting petition, and the year preceding the minor's placement in the petitioner's home—and that a failure to provide either maintenance and support or more than de minimis contact to the minor during *either* period would render a birth parent's consent to the adoption unnecessary. However, and the appellate court considered the record to show the minor may have been placed as early as November 2016 or as late as July 2020, and the trial court's decision was silent as to a date of placement. Because the probate court made no analysis of the birth father's support for or contact with the minor during the year prior to placement, the matter was remanded for the trial court to make additional findings of fact before determining the issue of consent.

Issue: Adoption/Protective Order not Justifiable Cause for No Contact
Title: *In re Adoption of A.R.A., 2023-Ohio-3606*
Court: 7th District, Carroll County
Date: September 28, 2023

Grandparent/custodian adoption. In January 2019, the mother and the minor obtained a protection order against the birth father based on instances of physical violence against the mother, including one occasion while the mother was holding the minor. The order was set to last until January 7, 2024, unless modified or terminated by the court.

Two years after the protection order was issued, the mother died. The minor's birth father moved to establish paternity and custody, but the minor's maternal grandmother obtained physical custody and was named the minor's legal guardian instead. It was agreed that if the birth father were to pass a drug test, the court would consider allowing the birth father supervised visitation, with an apparent goal of allowing him future custody.

In December 2022, grandmother filed an adoption petition, alleging that the birth father's consent was not required because he had failed without justifiable cause to provide more than de minimis contact with the minor during the year prior to the filing of the petition. The birth father had not seen the minor since the protection order was issued. In finding that his consent was not necessary, the trial court noted that the birth father never moved to modify or terminate the protection order, that the grandmother never took action to prevent the birth father from contacting the minor, and that the birth father failed to pass even a single drug test to resume visitation with the minor despite repeated attempts. The appellate court affirmed, additionally noting that the protection order was established to avoid violence from the birth father, as he had placed the minor in physical danger at least once.

Issue: Adoption/Consent/No Timely Objection/Appointment of Counsel
Title: *In re Adoption of M.L.M., 2023-Ohio-1876*
Court: 9th District, Summit County
Date: June 7, 2023

Grandparent/custodian adoption. The minor's maternal grandparents obtained legal custody of the minor in 2016. They filed a petition to adopt the minor on February 28, 2022, alleging that the consent of neither birth parent was required because they had each failed without justifiable cause to have more than de minimis contact with the minor or financially support the minor during the prior year.

The birth father was served notice of the petition on March 21, 2022. Service was perfected of record on March 29. On April 14, the birth father executed an affidavit of indigency, and counsel entered an appearance on his behalf on April 26. On April 29, the petitioners moved to find that the consent of either birth parent was unnecessary under R.C. 3107.07(K) because neither had filed an objection within 14 days after proof of service. Three days later, the birth father

submitted his objections and moved to file them instant. The trial court ultimately found that the birth father's consent was not required due to his failure to timely object.

The appellate court affirmed, declining to address the constitutional arguments the birth father had raised on appeal because they had not been properly raised among his underdeveloped arguments at the trial court level. However, the appellate briefly noted that one of the birth father's challenges—that the failure to appoint a guardian ad litem to speak to the minor's best interests as required in juvenile court proceedings was a violation of due process—was premature in any event, because the court had not yet made any determination of the minor's best interests.

Issue: Consent

Title: In Re Adoption of W.M., 2023- Ohio-1365

Court: 8th District, Cuyahoga County

Date: April 27, 2023

The trial court's decision dismissing the stepfather's petition for adoption was reversed because the manifest weight of the evidence did not support the trial court's determination that the stepfather failed to establish by clear and convincing evidence that father failed without justifiable cause to have more than de minimis contact with the child. Additionally, the father made no attempt to call, email, write, send a gift or card, or otherwise communicate with his child and other than stating that he believed he could not see his child because the mother told him he could not until a court ordered visitation, he presented no evidence that the mother prevented him from contacting his son.

Issue: Adoption/Consent

Title: *In re Adoption of M.G.S.*, 2024-Ohio-322

Court : 9th Appellate District, Summit County

Date: January 31, 2024

Granting stepfather's petition for adoption of child without requiring the consent of biological father is affirmed since father had failed to have more than de minimis contact with the child without justifiable cause during the relevant statutory one-year lookback period, R.C. 3107.07(A), where the court found that father did not request any visits with child despite having contact information for mother and child, that he did not pursue court intervention to establish a visitation order, and that he understood child was uncomfortable with him after a seven year absence yet never responded to mother's offers to pay for counseling to re-establish their bond.

Issue: Consent/Justifiable Cause

Title: *In re Adoption of B.R.R.*, 2024-Ohio-478

Court : 7th Appellate District, Columbiana

Date: February 8, 2024

Stepfather petitioned to adopt with Mother's consent. Mother and biological Father had a custody order from a Pennsylvania court. Father was granted supervised visitation with the minor. Father had a history of substance abuse issues. Father made attempts over the

years to contact Mother by phone/video calls or messenger apps. Father's efforts initially were sporadic as he struggled with substance abuse and had criminal issues in multiple states. Father last saw child when the child 1 1/2 years old and child is now 10. Father did not send gifts or cards. Father alleged that requirement of arranging visits through Mother was equivalent to a no contact order and that Mother had interfered with his rights to have contact with child. Probate court found consent not required and Father appealed. Held: Father's efforts to contact Mother are not equivalent to attempts to contact the child. Father could have exercised his rights to visitation but did not. Probate court did not err in finding consent unnecessary. Dissent would have found Mother interfered with Father's attempts to contact the minor as Father had to contact the minor Case Law and Legislative Update - Page 38 through Mother, who often did not return his calls, and Mother never told the minor who his biological father was until shortly before adoption hearing. Affirmed.

Issue: Adoption/Best Interest Factors
Title: *In re D.M.B-M, 2023-Ohio-2560*
Court: 5th District, Licking County
Date: July 25, 2023

Custodian adoption. Birth mother contested. Trial court found that adoption was in the best interest of the minors. On appeal, the court found that the trial court rendered judgment without any reference to R.C. 3107.161(B) or any of the non-exhaustive list of best interest factors contained within that statute. Accordingly, the trial court did not adequately state the basis of its decision. The appellate court reversed and remanded for the trial court to sufficiently indicate whether it considered the statutory factors and to explain their application to the case.

Issue: Adoption/Best Interest/Notice
Title: *In re Adoption of L.M.C., 2023-Ohio-3119*
Court: 11th District, Portage County
Date: September 5, 2023

The adoption petition alleged that the birth father's consent was unnecessary because he had failed without justifiable cause to have more than de minimis contact with the minor during the year prior to the filing of the petition. After hearing, a magistrate of the court issued a decision finding that the birth father's consent was not necessary on those grounds. Although the birth father objected to the decision, attempting establish facially justifiable cause for his lack of contact with the minor, he did not submit a transcript of the proceedings. Finding the birth father's arguments unpersuasive, the trial court overruled his objections. A final adoption was scheduled, although the birth father was not provided notice, and the trial court granted the adoption.

On appeal, the birth father argued that the petitioner had failed to meet the burden of proof regarding justifiable cause. The appellate court disagreed, and especially so as the trial court was not provided a transcript of the consent hearing to review when adopting the magistrate's decision. Judgment as to the issue of consent was affirmed.

However, the appellate court found that the trial court had erred in failing to provide the birth father with at least twenty days' notice of the final adoption hearing, as R.C. 3107.11(A)(2) requires notice to certain nonconsenting persons even though their consent is not required. Furthermore, the trial court's final decree of adoption made no reference to R.C. 3107.161(B) or its best interest factors, thus failing to state the basis for its decision. The appellate court therefore vacated the final decree of adoption, remanding the matter for a new final hearing with appropriate notice to the birth father and consideration of the statutory best interest factors.

Issue: Adoption/Best Interest
Title: *In re Adoption of E.G.C., 2023-Ohio-3563*
Court: 12th District, Clinton County
Date: October 2, 2023

The birth father had not seen the minor for more than two years prior to the filing of the stepparent adoption petition. A finding that the birth father's consent to the adoption was not necessary had already been upheld on appeal. Following a final hearing, the trial court determined that the adoption was in the minor's best interests.

Looking to the particular facts of the case, the appellate court summarized that that the stepfather and mother had together provided the minor a stable, loving, and nurturing home, and the stepfather was 'dad' to the minor. While the birth father and his family once had a relationship with the minor and desired a relationship again, the minor had had no contact with her paternal relatives for over six years, and while part of that time was during the adoption proceedings, it had been two years of inaction by the birth father that had broken off their relationship to begin with. Finally, the minor had a medical condition which made it extremely difficult for her to adjust to change. Noting that the trial court had access to all of the presented case facts, had reviewed the matter under R.C. 3107.161, and had in a better position to observe the witnesses and weigh their credibility, the appellate court found no abuse of discretion and affirmed the trial court's decision.

Issue: Best Interests
Title: *In re Adoption of A.R.A., 2024-Ohio-435*
Court : 7thAppellate District, Carroll County
Date: February 6, 2024

Mother had protection order against Father that prevented any contact. Mother died thereafter. Grandmother filed for adoption. Father's consent was determined unnecessary and upheld on appeal. Trial court then held a final hearing and found it to be in the best interest of the minor to

be adopted. The entry did not mention any of the best interest factors. Father appealed. Held: While it is preferable for a trial court to address the statutory factors in relation to the evidence, the record supports trial court's finding that adoption is in the minor's best interests. Affirmed.

Issue: Best Interest

Title: *In re Adoption of D.M.B.*, 2024-Ohio-675

Court : 5th Appellate District, Licking County

Date: February 22, 2024

Legal custodians petitioned to adopt minor children. Probate court granted adoption. On appeal, judgment was reversed to explain in sufficient detail, the court had considered the R.C. 3107.16(B) factors. On remand, probate court again granted adoption. Held: Probate court did not abuse its discretion in granting adoption when children had lived with petitioners most of their lives, children wished to be adopted, and petitioners provided stability and permanency. Affirmed. TOPIC: Immigration/Hague Convention/Indigent Petitioner TITLE: In re Adoption of U.I.; 2024-Ohio-682 COURT: 2 nd Appellate District COUNTY: Montgomery DATE: February 23, 2024 Maternal grandmother petitioned to adopt her two grandchildren. One child was born in Democratic Republic of Congo and the other child was born in a refugee camp in Uganda. Both parents were deceased. Grandmother and children were lawful permanent residents. Grandmother moved to waive initial cost deposit which was granted. Probate court later dismissed case based on Grandmother's failure to keep costs current of \$72.00 and that it lacked subject matter jurisdiction. Held: Better practice is to give notice of intent to dismiss case rather than sua sponte doing so. Lawful permanent residents are not precluded from adopting. Hague Convention did not apply to these adoptions as Grandmother and children were lawful permanent residents of the U.S. and the adoption was not an intercountry adoption. Also, probate court's dismissal of case based on inability to pay costs as case proceeds is contrary to R.C. 2746.10. Reversed

Estates

Issue: Determination of Heirship/Legal Parentage

Title: *Chabek v. Gajdos*, 2024-Ohio-254

Court: 8th District, Cuyahoga County

Date: January 25, 2024

A purported son of the decedent sought declaratory judgment that he was the decedent's legal child and entitled to inherit from the decedent's estate. It was alleged that person named as father on the purported son's birth certificate had been listed there 'for convenience purposes' after marrying the purported son's mother, but the named father had never formally adopted the purported son.

Responding to a joint request from the parties, the trial court reviewed its own docket to determine that there was no record of the purported son's adoption in that county. Correspondence and records ordered to be released from the Ohio Department of Health, Division of Vital Statistics, established that the purported son's birth certificate had been amended to establish the paternity of the named father pursuant to R.C. 3705.09 while the plaintiff was still a minor. The trial court accordingly found that the named father was in fact the legal father of the purported son, who could not therefore be the legal son of the decedent. The appellate court affirmed, noting that the other means of legitimizing a child for inheritance purposes had not occurred and that the declaration of paternity in the plaintiff's birth record was legally determinative.

Issue: **Estates/Parentage/Next of Kin**
Title: ***In re Estate of Murphy v. Murphy, 2023-Ohio-3904***
Court: **5th District, Coshoccon County**
Date: **October 26, 2023**

The decedent died intestate, his brother applying to administer the estate as sole next of kin. A son of the decedent's wife moved to intervene under Civ.R. 24(A)(2), claiming to be the decedent's natural son. The trial court allowed the movant to provide evidence about his paternity before ruling, but did not explain its reasoning when denying his intervention.

The appellate court explained that in order to intervene under Civ.R. 24, the movant must establish a colorable protected legal interest in the estate proceeds. While the movant contended that he could inherit because the decedent had acknowledged him after marrying his mother, the appellate court considered movant's evidence on the matter insufficient to establish even a colorable claim. As it therefore appeared that the movant would be incapable meeting the higher burden to actually establish parentage, his intervention was properly denied.

Issue: **Estates/Next of Kin/Civ.R. 60(B)**
Title: ***In re Estate of Shanley, 2023-Ohio-2614***
Court: **7th District, Jefferson County**
Date: **July 26, 2023**

After the decedent's death, his son was the only next of kin reported on the estate Form 1.0. The son was appointed administrator. Another individual reached out to the son's counsel asserting that she was the decedent's daughter, the son nevertheless proceeded to transfer all estate assets to himself.

Soon after a certificate of termination was approved, the daughter sought to reopen the estate with a motion for relief from judgment, including such evidence as a divorce decree naming the daughter a child of the decedent's marriage. The trial court found that the daughter had met her burden under Civ.R. 60(B)(1) and (3), vacated the entry which discharged the son as fiduciary

and terminated the estate, appointed an independent successor administrator, and ordered the son to file an interim account. The son appealed.

The appellate court confirmed that the probate court's entry constituted a final appealable order under R.C. 2505.02(A)(2) because it removed the son as estate fiduciary: no meaningful or effective remedy could be granted on appeal after the final resolution of the estate. The appellate court affirmed both the granting of relief from judgment and the appointment of an independent successor fiduciary.

Issue: Estates/Fees/Sup.R. 45
Title: *In re Estate of Jordan, 2024-Ohio-5*
Court: 1st District, Hamilton County
Date: January 3, 2024

A decedent was survived by two sons, the two beneficiaries of her will. The son appointed as her first executor was named as a defendant to a defamation suit in both his individual and fiduciary capacities, then used estate assets to hire counsel to represent him in that case.

The other son of the decedent filed exceptions to the first executor's proposed final account, but the first executor continuously evaded discovery and ignored discovery orders. On these and other grounds, the court granted default judgment against the first executor and removed him. The trial court eventually awarded half of the value of the attorney fees and funds misappropriated by the first executor, plus interest, to the other son as damages.

The appellate court affirmed that estate funds should not have been used for the defamation attorney fees, as the suit was unrelated to estate administration, raised no allegations against the estate, and placed no estate assets at risk, and affirmed that default judgment was an appropriate discovery sanction against the first executor. Although R.C. 2109.301(B)(1)(d) prevents the filing of a final account while the executor is a party to a civil action, the pendency of defamation suit was no bar to a final account because the first executor had already been removed from his fiduciary role.

However, during the course of litigation, unredacted personal bank records of the first executor were filed in the trial court, and the trial court refused to strike the unredacted documents even after redacted copies were filed. Sup.R. 45(D) requires parties filing with the court to remove personal identifiers from the filings, and the appellate court therefore remanded the matter for the limited purpose of striking the unredacted arguments.

Issue: Estates/Trust/Standing to Remove Fiduciary
Title: *In re Estate of Reck, 2023-Ohio-4206*
Court: 2nd District, Darke County
Date: November 22, 2023

The decedent's will made two specific bequests, leaving the residuary to a trust which included an in terrorem clause. A daughter of the decedent and beneficiary of the trust sought declaratory judgment invalidating the first amendment to the trust in the general division. While that action

was still pending, the daughter also moved for the removal of the decedent's executor in the trial court. A determination that the daughter had violated the in terrorem clause and therefore lacked standing to seek the executor's removal was upheld on a prior appeal.

The daughter subsequently filed for relief from the trial court's judgment regarding standing based on newly discovered evidence from the declaratory judgment action: a second amendment to the trust, which removed the daughter as a beneficiary. If she were not a beneficiary of the trust, the daughter argued, the in terrorem clause would not apply to her. Accepting the daughter's allegations as true, the trial court denied relief from judgment on the grounds that the newly discovered evidence would lead to the same result: the daughter would lack any pecuniary interest in the estate to give her standing to seek the executor's removal. The appellate court affirmed.

Issue: Estates/Reopening Estates/Standing
Title: *In re Estate of Sudman, 2023-Ohio-4356*
Court: 3rd District, Auglaize County
Date: December 4, 2023

The decedent and the surviving spouse had entered into a prenuptial agreement allowing the spouse to live in the decedent's home while she remained his widow. The decedent's will was not clearly drafted, but effectively made provisions in line with the prenuptial agreement. The will further providing that the death of the surviving spouse, the decedent's son would take half "the value that is in [the decedent's estate]" in fee simple, with the other half to be split equally between the decedent's two stepchildren.

Acting as executor, the surviving spouse obtained a certificate of transfer transferring the decedent's house to the son without reserving an interest for herself. A final account was approved and the estate was closed.

The surviving spouse relinquished the decedent's house to her son after she remarried. However, the surviving spouse and stepchildren later moved to reopen the estate under R.C. 2109.35(B), ultimately seeking a new certificate of transfer granting the wife a life estate in the decedent's home, remainder to the son and stepchildren. The trial court denied the motion, as the wife and stepchildren had not shown that the estate had been improperly administered; the will and prenuptial agreement did not create a life estate to the wife; and the wife's acts in administering the estate were contrary to her current contentions.

In affirming the trial court's decision, the appellate court found that neither the surviving spouse nor the stepchildren were persons affected by the order settling the estate's final account as described in R.C. 2109.35(B): the surviving spouse had been a party to the original proceedings and consented to the account, and the stepchildren were at best contingent beneficiaries without a vested interest in the estate. The appellate court provided, however, that its opinion was premised on the particular facts and circumstances of the case.

Issue: Will Contest/Standing
Title: *In re Estate of Carte v. Bringardner, 2023-Ohio-4286*
Court: 10th District, Franklin County
Date: November 21, 2023

Decedent made a specific bequest to Appellant in a 2006 will and a residuary beneficiary of a 2006 trust. In 2010, Decedent removed Appellant's beneficial interests via codicil and a trust amendment. Also in 2010, Decedent executed a second codicil and trust amendment which left nothing to Appellant. A 2011 will revoked all of Decedent's prior wills and codicils to a 2011 amendment and restatement of the 2006 trust, which left nothing to Appellant. A 2012 will revoked all prior wills and codicils and left everything to the 2012 amendment and restatement of the 2006 trust, which left nothing to Appellant. Appellant was not a statutory next of kin of Decedent.

In challenging the 2012 will and trust amendment, Appellant sought discovery of Decedent's medical records, financials, and notes from the drafting attorney. Decedent's estate opposed the discovery on multiple grounds. One month after the discovery cutoff date set by scheduling order and after Appellees had moved for summary judgment, Appellant filed a motion to compel and a motion for additional discovery time under Civ.R. 56(F). Appellant had not previously sought the court's intervention in the discovery dispute.

The trial court ruled against Appellant on the discovery issues as untimely and granted Appellees' motion for summary judgment because Appellant lacked standing to challenge the will.

Generally, trial courts do not abuse their discretion in denying motions to compel or Civ.R. 56(F) motion when the party lacked diligence in conducting discovery or seek court involvement until after a discovery cutoff date. Here, Appellant made no effort to depose witnesses before the discovery cutoff, never requested an extension of the cutoff date, and otherwise lacked diligence in conducting discovery. Therefore, the appellate court found that the trial court did not abuse its discretion in denying the Civ.R. 56(F) motion and motion to compel.

Standing to contest a will requires the party to have "a direct, immediate, and legally ascertainable pecuniary interest" in the estate, either through the will or through setting the will aside. *State ex rel. Abraitis v. Gallagher*, 143 Ohio St.3d 439, 2015-Ohio-2312.

Here, Appellant was Decedent's son-in-law and not entitled to any intestate share of the estate, and Appellant also was not a beneficiary of the 2012 will. When a party contesting a will would not inherit under intestacy, the party must show a direct pecuniary interest in a prior will that had not been validly revoked. The 2010 codicils and 2011 will were all signed by Decedent and two competent witnesses and did not name Appellant as a beneficiary, a finding not challenged by Appellant. Accordingly, the appellate court affirmed the trial court's finding that Appellant lacked standing to contest the will under R.C. 2107.71(A) and that the motion for summary judgment was properly granted.

Issue: Will Contest
Title: *In re Estate of Pursell v. Pursell, 2023-Ohio-2531*
Court: 3rd District, Allen County
Date: July 24, 2023

The decedent executed a will naming his son as sole beneficiary and disinheriting his other children. When the will was contested, the son sought summary judgment based on an affidavit from the attorney who drafted the will and notes from the decedent's meetings with counsel. The contestants alleged that the decedent struggled with his finances, had required the assistance of an attorney to administer his wife's estate, and had been taken advantage of by the son on numerous occasions after the will was signed, but the trial court found that they failed to provide actual evidence of lack of capacity and only speculative evidence of undue influence. Summary judgment was granted, and the appellate court affirmed.

Issue: Will Contest
Title: *Buffenbarger v. Estate of Meyer, 2023-Ohio-2760*
Court: 4th District, Highland County
Date: July 26, 2023

The decedent's will left the bulk of the decedent's assets to the nephews who were nominated as executors. A number of decedent's relatives brought a will contest action under various theories, including undue influence, a lack of testamentary capacity, and defects in execution. Depositions submitted in the case included testimony from the witnesses to the will and from the contestants, but the executors pointed out that none of the contestants had no personal knowledge of the circumstances surrounding the preparation and execution of the will; none of them had been in contact with the decedent within a reasonable time surrounding the execution of the will. Based on the deposition, the trial court granted summary judgment to the executors.

Noting that the decedent's will enjoyed a prima facie presumption of validity further supported by the admissible statements of the will's witnesses, and generally describing the contestants' arguments against validity as speculative and unsupported by admissible evidence, the appellate court affirmed.

Issue: Will Contest/Timing of Filing/ Standard of Review
Title: *Wood v. Fernandez, 2023-Ohio-2435*
Court: 12th District, Butler County
Date: July 17, 2023

Sister of incompetent ward filed will contest as next friend. Beneficiary challenged on timeliness of complaint due to being time stamped several days after being received by deputy clerk;

capacity of sister to sue, denial of summary judgment, and use of incorrect jury instruction on burden of proof. Summary judgment denied to Beneficiary. Jury verdict for Sister using preponderance of the evidence standard on undue influence. Beneficiary appealed.

HELD: Practical and legal effect of presenting a document that is received instead of filed is that it is filed on that date it is received. Denial of summary judgment to a party who ultimately loses at trial is a moot issue. Improper jury instruction as to burden of proof on undue influence being preponderance of the evidence rather than clear and convincing is wrong and merits reversal.

Issue: Estates/Antenuptial Agreement/Statute of Limitations
Title: *In re Estate of Taylor, 2023-Ohio-2195*
Court: 3rd District, Defiance County
Date: June 29, 2023

The decedent and his spouse signed a document titled “Antenuptial Agreement” after their marriage. After the decedent died, the surviving spouse sought to set aside the agreement as an invalid postnuptial agreement under former R.C. 3103.06. The decedent’s daughters contended that because the surviving spouse had failed to petition the court to set aside the agreement within the four-month period to contest antenuptial agreements set by former R.C. 2106.22, the agreement was valid as a matter of law and the trial court was without jurisdiction to proceed. The trial court found that notwithstanding its title, the agreement was in fact a postnuptial agreement void ab initio under the law in effect at its execution. The appellate court affirmed.

**Note that R.C. 3103.06 became effective March 23, 2023.

Issue: Estates/Real Property/Divorce
Title: *In re Estate of Coppick, 2023-Ohio-2279*
Court: 4th District, Meigs County
Date: July 5, 2023

The decedent and his wife purchased a home jointly with rights of survivorship. When they divorced, their agreed decree indicated that they would “remain as joint owners” of the home.

The decedent died intestate, and his administrator included a half-interest in the home on the estate inventory. When the administrator filed a complaint to sell the home, the decedent’s ex-wife answered asserting she held a survivorship tenancy in the entire property. The administrator contended that the ex-wife’s survivorship tenancy had been terminated by R.C. 5302.20(C), which converts a survivorship tenancy held by a married couple into a tenancy in common upon divorce unless the judgment of divorce expressly states that the survivorship tenancy will survive. Construing the dispute before it as a declaratory judgment action, the trial court found in favor of the ex-wife and declared that the home was not a probate asset.

Although the appellate court found harmless error by the trial court, the appellate court ultimately affirmed its judgment, finding that the language used in the divorce decree constituted a direct and unmistakable statement that the survivorship tenancy would continue.

Issue: Wrongful Death/Distribution of Proceeds
Title: *In re Estate of Snider, 2023-Ohio-3576*
Court: 5th District, Stark County
Date: October 3, 2023

The decedent died survived by a minor child and an adult child. The evidence suggested that the adult child had a normal-parent child relationship with the decedent until the adult child until the age of 15 or 16, after which communication became sporadic and their relationship became “rocky.” The trial court found that the presumption of damages for the adult child had been rebutted and therefore awarded 98.6% of the wrongful death proceeds to the minor child and 1.4% to the adult child.

The appellate court reversed and remanded for further proceedings. The appellate court considered the evidence to show that a relationship did exist between the decedent and the adult child, albeit a strained one, and that the decedent’s own actions was at least partially responsible for that strain. Although the appellate court found that that the presumption of damages for the adult child had not in fact been rebutted, it opined that the minor child should likely still receive a larger distribution based on his age and the fact that the decedent was his daily caregiver.

Issue: Wrongful Death/Medicaid Estate Recovery
Title: *In re Estate of Goode, 2023-Ohio-4253*
Court: 3rd District, Marion County
Date: November 27, 2023

The decedent’s estate sought approval of a wrongful death settlement, with no allocation of proceeds to a survivorship claim. The settlement agreement contained a clause wherein the estate agreed to pay all subrogated claims resulting from the decedent’s injury and death, indemnifying the tort defendants as to such claims. The Ohio Department of Medicaid, which sought reimbursement from the estate, opposed the estate’s proposed allocation, seeking to enforce the subrogation clause under the interpretation that the estate must repay the entire amount owed to ODM.

The trial court found that ODM was not an intended third-party beneficiary of the settlement agreement, such that it lacked standing to challenge the terms or enforcement of the agreement. Although the trial court apportioned part of the settlement amount to a survival claim, from which ODM might be able to recover, the trial court found that ODM could only be paid up to the amount of its subrogated claim. The trial court’s decision was affirmed.

Issue: Concealment of Assets
Title: *Bennett v. Bennett, 2023-Ohio-4856*
Court: 6th District, Lucas County
Date: December 29, 2023

A complaint for concealment was brought against a child of the decedent. The trial court found that none of the assets complained of were estate assets, and there was no evidence that the child had in fact concealed them.

The appellate court affirmed, finding that the trial court's decision was not against the manifest weight of the evidence. The appellate court gave deference to the trial court's assessment of witness testimony in finding that certain transfers made during the decedent's life were made with his knowledge and approval and found evidence to support that inappropriate post-death transfers went towards funeral expenses. Although the child had helped the decedent pay his bills, there was no fiduciary or confidential relationship between them which would shift burdens of proof because the decedent was competent and actively engaged in his finances. Finally, the trial court did not err in finding that the child owed no rent for living in the decedents house, as there had never been a demand for rent or an attempt at eviction.

Issue: Concealment of Assets/Intent/Fees
Title: *In re Estate of Ohman, 2023-Ohio-4008*
Court: 6th District, Sandusky County
Date: November 3, 2023

Decedent prepared a will naming Mr. & Mrs. Ridoutt as executors. Ridoutts obtained access to decedent's apartment after her death and secured property therein in a storage unit and some elsewhere. Mr. Ridoutt filed an application to relieve estate from administration, which was later withdrawn by consent entry. Ridoutts agreed to resign as executors and Mrs. Ridoutt disclaimed as beneficiary. Sister appointed as administrator of decedent's estate. Mrs. Ridoutt dies and Mr. Ridoutt appointed executor of her estate. Decedent's estate files claim against Mrs. Ridoutt's estate for change of beneficiary designation on life insurance and removal of personal property. Mrs. Ridoutt's estate rejects claim. Decedent's estate sues alleging improper rejection of claim and concealment. Mr. Ridoutt ordered to return personal property able to be retrieved, pay judgment for missing jewelry, 10% penalty and attorney's fees. Mr. Ridoutt objects. Probate court overrules objections.

Held: Civil Rules do not ordinarily apply to special statutory proceedings but Civ. R. 53 does not alter basic statutory purpose for R.C. 2109.50 and so is applicable. Appellant failed to provide transcript to probate court but supplement on appeal. Appellate court bound by factual determinations made by magistrate due to Appellant's failure to provide a complete record. Test for concealment is not strict liability but requires showing that the asset is the exclusive property of the estate and that the defendant has unauthorized possession of the asset or in some way has impermissibly disposed of it. Concealment requires wrongful, fraudulent, or criminal conduct but

criminal intent is not always required. Record does not establish good faith defense. Award of judgment and attorney's fees also affirmed as transcript not provided and factual findings will not be disturbed on appeal.

Issue: **Concealment of Assets/Not a Substitute for Civil Action**
Title: ***In re Estate of Thompson, 2023-Ohio-2547***
Court: **7th District, Columbiana County**
Date: **July 13, 2023**

A farming business presented a claim to the executor of the decedent's estate. After the claim was rejected, the business filed suit in the general division of the court of common pleas to recover. The estate asserted counterclaims under various causes of action, stating that the business was in possession of tangible personal property of the estate and owed the estate money.

Over a year later, the executor brought a concealment action against the business in the trial court, concerning the property and money at issue in the general division. The trial court stayed the concealment action pending the outcome of the general division case. The general division eventually found in favor of the business, offset by a finding for the estate for the debt and personal property. Determining that the general division judgment was res judicata, the trial court dismissed the concealment action.

The appellate court agreed with the trial court's application of res judicata because the issue of possession of alleged estate assets had been fully argued in the general division case. The streamlined process of a concealment action was no longer an appropriate vehicle to recover estate assets where a longer civil process to the same ends had already taken place. Furthermore, because the estate's property had already been returned after only reasonable delays and the controversy had involved a good-faith business dispute, neither damages for concealment nor an award of attorney fees was warranted.

Issue: **Concealment of Assets/Fees**
Title: ***Pollnow v. Polivka, 2023-Ohio-2830***
Court: **11th District, Trumbull County**
Date: **August 14, 2023**

Pollnow is the administrator of the estate of Jill M. Pollnow, who was killed by her fiancé, Vincent T. Coburn ("Mr. Coburn") in a murder-suicide. Ms. Pollnow filed two concealment actions against Mr. Coburn's third cousin, Polivka to recover assets on behalf of Mr. Coburn's estate as an alleged interested party (creditor) due to a pending wrongful death claim against Mr. Coburn's estate. One concerned a truck and the other concerned jewelry and other personal property. Pollnow appeals judgment that denied her motion for a ten percent penalty, attorney fees, and litigation expenses following the trial on the concealment action relating to the truck.

Held: The purpose of a concealment is not to furnish a substitute for a civil action to recover a judgment for money owing to an administrator but rather to provide a speedy and effective method for discovering assets belonging to the estate and to secure possession of them for purposes of administration. The statute may not be used to collect a debt, obtain an accounting, or adjudicate the rights of the estate or guardian under a contract.

Costs are generally defined as the statutory fees to which officers, witnesses, jurors and others are entitled for their services in an action and which the statutes authorize to be taxed and included in the judgment. Costs are not synonymous with litigation expenses unless expressly made so by statute. The Supreme Court of Ohio has held that, absent statutory directive, a trial court should not tax an expert's witness fees as costs. No abuse of discretion to deny costs for expert handwriting fees not hired by recovering estate.

Probate court's finding that a defendant was guilty of concealment of estate assets is tantamount to a finding that the defendant acted in bad faith and/or for oppressive reasons in concealing the assets, so that such a finding gives the probate court the authority to order him to pay the attorney fees associated with the prosecution of the case. Mere possession of estate assets, however, is an insufficient basis on which to make a finding of guilt. An attorney who represented the executor of the estate in a concealment action was not entitled to an award of attorney fees because the attorney was not a party in interest to the concealment of assets suit or the fiduciary of the estate. Pursuant to R.C. 2109.52, the executor or fiduciary of the estate was the only party to whom the probate court could award attorney fees. Creditor's claim against an estate would not entitle attorney of creditor to an award of attorney fees.

Issue: Concealment

Title: *Williams v. Williams*, 2024-Ohio-758

Court : Second Appellate District, Montgomery County

Date: March 2, 2024

In action brought by mother's guardian alleging that her sister had concealed or embezzled assets from estate, trial court erred in granting guardian's motion for default judgment since an action under the statutes for concealment of embezzlement in probate court is a "special proceeding which is inquisitorial in nature and involves a charge of wrongful or criminal conduct on the part of the accused", the trial court did not issue a citation compelling sister to appear after filing of amended complaint, her non-appearance could have resulted in imprisonment for failure to obey court's order to appear pursuant to R.C. 2109.50, and the court lacked statutory authority to issue a default judgment in sister's absence.

Issue: Concealment

Title: *Weingberg v. Merriman*, 2024-Ohio- 1361

Court : Eighth Appellate District, Cuyahoga County

Date: March 14, 2024

Dismissal , Civ.R. 12(B)(1), of deceased attorney's executor's action for concealment of assets, R.C. 2109.50 et seq., is affirmed where the parties dispute arose from a disagreement between decedent and attorneys who left decedent's firm to form their own firm, resulting in a settlement

agreement providing that disputes concerning the division of fees for matters in which the attorneys served as co-counsel would be subject to arbitration or mediation pursuant to Prof.Cond.R. 1.5 and the trial court determined that it lacked jurisdiction over the concealment case because the parties' dispute was actually a fee dispute arising out of the settlement agreement.

Issue: **Estates/Accounts/Exceptions**
Title: ***In re Estate of Wolff, 2023-Ohio-4457***
Court: **6th District, Lucas County**
Date: **December 8, 2023**

The decedent and one of his sons entered into a purchase agreement for a home they intended to renovate and sell. The decedent died in possession of a cashier's check from his personal bank account payable to a title agency. The son found the check and used it to close on the sale of the home, obtaining a deed in the son's name only.

The son filed exceptions to an estate account listing the value of the check as a loan from the decedent to his son. A magistrate of the court determined that the check was an estate asset to which the son had no legal claim because it was in the decedent's possession at the time of his death. The son did not object to the magistrate's decision, which was subsequently adopted by the trial court.

Although the son argued on appeal that R.C. 2113.50 permitted the completion of a land purchase contract entered into before a decedent's death, the son had never filed the necessary application for authority to complete the transaction. The trial court's judgment was affirmed.

Issue: **Estates/Jointly Owned Accounts**
Title: ***DiPalma v. DiPalma, 2023-Ohio-4053***
Court: **9th District, Summit County**
Date: **November 8, 2023**

Decedent passed away on December 9, 2020. Two days prior to his death, on December 7, 2020, his daughter, Catherine DiPalma, withdrew approximately \$85,000 from two accounts, a checking and a savings account, at Fifth Third Bank. John and Catherine were joint owners of both accounts. John did not object to the withdrawal before he died and neither did the bank. Upon learning that his sister withdrew the money from the joint accounts, Michael DiPalma filed a complaint for declaratory judgment, concealment, breach of fiduciary duty, and self-dealing. After dismissal of some counts, probate court granted summary judgment to Catherine.

Held: Existence of a joint and survivorship bank account raises a rebuttable presumption that co-owners of the account share equally in the ownership of the funds on deposit absent evidence to contrary. A joint and survivorship account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent. No dispute about ownership during lifetime of

decedent. Record indicates that decedent knew Catherine was routinely taking money out of the joint account and transferring it into her personal account to pay his bills. Additionally, Catherine stated that she had decedent's permission, and the ability as a joint account holder, to use the money for her own personal benefit. Bank employee's deposition and records reflect status of joint owners. Affirmed.

Issue: **Creditor's Claim**
Title: ***Maplewood at Chardon v. Stinn, 2023-Ohio-2539***
Court: **11th District, Geauga County**
Date: **July 24, 2023**

Maplewood at Chardon filed a Complaint against Administrator for Breach of Contract, Action on an Account, and/or Unjust Enrichment based on a Residency and Services Agreement entered into by Maplewood at Chardon and Attorney Camino as power of attorney for decedent. Attorney Camino appointed as initial administrator. He communicated with Maplewood but died during administration. Stinn appointed as successor administrator. Summary judgment granted to Maplewood. Appeal from decision.

Held:

No requirement that Maplewood at Chardon deliver its claim by ordinary mail, the executor actually received the claim, or a copy of the claim be filed with the probate court. Presentment of a claim by filing it with the probate court or in a writing actually received by the executor or administrator are alternative forms of presentment provided for by the statute. No strict form requirements are imposed for the presentment of claims to an executor. It is sufficient if it states the character and amount of the claim, enables the representative to provide for its payment, and serves to bar all other claims by reason of its particularity of designation. Billing statements have been deemed sufficient. Emailed statements are sufficient as electronic record serves to fulfill the writing requirement. There is no requirement in the statute that the creditor know or identify the administrator of the estate as such.

Issue: **Estates/Presentment of Claims**
Title: ***In re Estate of Wearn, 2023-Ohio-3152***
Court: **8th District, Cuyahoga County**
Date: **September 7, 2023**

Third party administrator Dunson opened estate to collect unclaimed funds. Decedent's son, Wearn, filed multiple motions, often consisting of hundreds of pages, challenging every aspect of Administrator's administration of estate. He claimed that the court deprived him of notice of hearings or deprived him of requested "in person" hearings, sought removal of Dunson on multiple occasions, disagreed with every accounting Dunson provided, demanded reimbursement for pre-administration expenses and expenses incurred as part of maintaining his mother's home, which was in foreclosure, filed a police report against sister who allegedly removed items from

their mother's home without notice, objected to Dunson's administrator's fees, and declined to accept distributions from the estate. Wearn challenged administration throughout including motion to remove fiduciary, refused to accept partial and final distribution and challenged delivery of his funds to unclaimed funds. Wearn did not appeal denial of decision to not remove fiduciary. Wearn did not exercise rights to disqualify judge or for extraordinary writs. Wearn failed to provide transcript of alleged errors and failed to articulate arguments on appeal. Wearn's share of estate eventually deposited into unclaimed funds as he refused to cash checks due to ongoing dispute with the estate. Affirmed.

Issue: Claim against Estate

Title: *In Re Estate of Snodgrass, 2024-Ohio-228*

Court : 5th Appellate District, Morgan County

Date: January 22, 2024

In appellant-former oil and gas lessee's claim against estate of property owners seeking to transfer ownership and responsibility of wells back to estate, denied by the probate court as being barred by the six month rule in R.C. 2117.06(C), appellant's subsequent motion for findings of fact and conclusions of law was untimely and therefore did not serve as an exception to running time for an appeal under App.R. 4(B), and estate's motion to dismiss appeal is granted where appellant failed to timely file appeal, and his motion for leave to file delayed appeal was not granted because App. R. 5(A)(1) does not provide for delayed appeals in civil cases.

Issue: Estates/Removal of Administrator/Proffer

Title: *In re Estate of Jones, 2023-Ohio-2829*

Court: 11th District, Geauga County

Date: August 14, 2023

Decedent died during divorce proceedings with her husband, Mr. Jones. Mr. Jones and Decedent's mother, Mrs. O'Neill filed competing applications for authority to administer Decedent's estate. The trial court denied both applications and appointed a third-party administrator. Mr. Jones filed a motion to remove the third-party, which was denied. This appeal followed.

Due to the intermingling of property between the applicants and the estate, the hostility between Mr. Jones and Mrs. O'Neill, and the competing claims against each other on behalf of the estate, the court found that a third-party would be appropriate.

At the removal hearing, Mr. Jones did not call any witnesses, including himself, because his counsel did not believe it was Mr. Jones' burden. After the hearing, the court reaffirmed its prior finding that Mr. Jones was not suitable to serve as administrator and had not stated a reason for the third-party's removal.

As Mr. Jones presented no evidence for his suitability or for the third-party's removal, the appellate court could not find that the trial court abused its discretion.

Generally, proffers should be accepted. However, in this case, the trial court correctly refused the proffer because Mr. Jones asserted he did not have a burden to present any witnesses or evidence, did not challenge the third-party's suitability, the purported proffer was disingenuous, and failed to prove the proffer denial affected a substantial right.

Issue: Estates/Declination to Serve
Title: *In re Estate of Welch, 2024-Ohio-32*
Court: 12th District, Clinton County
Date: January 8, 2024

On July 14, 2016, the probate court approved a final and distributive account in a highly contested case and discharged the executor. Subsequently, the heirs filed actions against the former fiduciary for allegedly improper inter vivos transfers. On October 31, 2022, an heir filed to reopen Decedent's estate and be appointed fiduciary for the purpose of obtaining Decedent's medical records and estate documents. On January 30, 2023, the court denied the application for appointment but did not address the application to reopen.

The applicant was named successor executor in Decedent's will. The applicant argued that the former and first-nominated executor renounced the position by failing to move to reopen the estate and surrender the documentation to the heirs. R.C. 2113.12 states that a nominated executor renounces the position by refusing to accept the trust, neglects to appear and accept the trust, or neglects for more than 20 days after the probate of the will to give required bond. In this case, the prior executor actually accepted the trust, completed her duties, and terminated the case. Accordingly, the court found that the applicant failed to show that the prior executor had renounced. Further, the applicant's reason to be appointed was effectively to engage in discovery useful to her suit against the former executor, making the applicant unsuitable to serve. The appellate court affirmed the trial court.

Issue: Interference with inheritance/Fiduciary Duty
Title: *Batsche v Batsche, 2024-Ohio-1234*
Court : 12th Appellate District, Clermont County
Date: April 1, 2024

In plaintiff-sons's tortious interference with expectancy of inheritance action against defendant-stepmother for withdrawals from father's accounts, one while father was in hospice care and one after his death, trial court did not err in denying plaintiff's Civ. R. 50 motion for directed verdict where, although defendant had a fiduciary duty to father as power of attorney, the presumption of undue influence did not remove plaintiff's burden of proof, and evidence showed that father remained mentally capable of making decisions, including instructing defendant to make withdrawals from accounts.

Issue: Administrator/Fiduciary Duty
Title: *In re Estate of Nugent, 2023-Ohio-700*
Court : 10th Appellate District, Franklin County
Date: March 7, 2023

Granting decedent's sister-heir's motion to remove appellant as administrator of decedent's estate was no error where appellant did not act for the benefit of heir as beneficiary when appellant transferred heir's entire interest in estate to herself, appellant committed a per se violation of the duty of loyalty under R.C. 2109.44, even though heir insisted on assigning her interests to appellant and appellant's advice that heir retain counsel did not absolve appellant of her own duties as fiduciary

Issue: Estates/Indigency
Title: *In re Estate of House, 2023-Ohio-4348*
Court: 9th District, Wayne County
Date: December 4, 2023

Sole applicant to administer decedent's estate moved to waive all filing fees on the basis of indigency. Probate court denied the motion for failure to state good cause. The matter proceeded to a hearing before a magistrate, who found the applicant unsuitable to serve as administrator. Eventually, the magistrate's decision was adopted and the case ordered closed until an interested party took steps to reopen the matter.

The appellate court found that the applicant's due process rights were not violated in failing to grant indigency status because instead of dismissing the application to administer, the matter was set for hearing, with a substantive ruling issued. The applicant's objection to the decision closing the case did not prejudice the applicant because the applicant had already been found unsuitable to serve as administrator. Trial court affirmed.

Issue: Property sale/court approval/relief from judgment
Title: *In re Estate of Winkelmes, 2024-Ohio-288*
Court : Fifth Appellate District, Muskingum County
Date: January 26, 2024

In action for specific performance of first buyers' agreement to purchase property from estate after estate entered into another agreement with second buyer to sell the same property where the probate court granted attorney's motion to allow estate to sell to second buyer, trial court did not err in granting first buyer's motion to vacate the judgment where Civ. R. 60(B)(1) applied because the estate breached the purchase agreement with first buyers, who proved that they signed a purchase agreement first, both agreements were appropriately voided because each sale was contingent on approval by the probate court, and estate could offer the parcel for sale to any interested parties "on such terms and conditions as may be in the best interest of the estate"

Issue: Magistrate's decision/Objections/Hearing

Title: *In Re Estate of Banks*, 2024-Ohio-623

Court : 9th Appellate District, Lorain County

Date: February 20, 2024

In executor's application to distribute mother's property in kind to brother after brother failed to deliver all mother's property to executor for distribution, trial court's adoption of magistrate's decision granting the application is affirmed where brother failed to file timely objections to magistrate's decision, he was not prevented from presenting evidence even though he had to attend hearing by telephone instead of through video conference, and he had ample time to obtain substitute counsel.

Issue: Quantum meruit/promissory estoppel/services rendered

Title: *Vandyne v. Faldoski*, 2023-Ohio-2370

Court : 7th Appellate District, Belmont County

Date: June 30, 2023

In Plaintiffs-decedent's companion's heirs' quantum meruit and promissory estoppel action against defendant-decedent's estate, seeking compensation for expenses plaintiffs incurred in caring for decedent after companion's death, judgment in favor of defendant is affirmed where plaintiffs failed to demonstrate a promise made by decedent to compensate them for goods and services they provided him, plaintiffs had no expectation of payment at the time they rendered the services for decedent and plaintiffs' reliance on any oral commitments by decedent to provide them a legacy was unreasonable under R.C. 2107.04

Issue: Attorney disqualification/conflict of interest

Title: *Shteivi v. Shteivi*, 2023-Ohio-873

Court : 12th Appellate District, Butler County

Date: March 20, 2023

In plaintiffs-executor and family business' action against defendant-decedent's brother, seeking a declaration that decedent's estate was a majority owner of shares of the business, trial court did not err in denying defendant's motion to disqualify plaintiffs' counsel where defendant alleged that the executor and the business had adverse interests, but defendant failed to show that the alleged conflict of interest under Prof. Cond. R. 1.13 and 1.7 posed a significant risk of tainting the trial or that he was prejudiced by any ethical violation, and even if denial of defendant's motion for disqualification were error, reversal of the judgment would not be required.

Issue: Declaratory Judgment/settlement agreement/consideration

Title: *Sowery v. Todd*, 2023-Ohio-1162

Court : Second Appellate District, Miami County

Date: April 7, 2023

In executor's declaratory judgment action alleging that sister had improperly taken control of money contributed solely by mother to several bank accounts, trial court erred in finding that the parties' purported settlement agreement was enforceable since sister did not provide any consideration to make the settlement agreement enforceable because she had asserted no claim against executory which would be compromised by settling the parties' dispute, the desire to reduce the expense of litigation was a motive for a settlement but no consideration, and sister's acceptance of executors promises did not convert them into an enforceable agreement.

Issue: Reopen Estate/Concealment

Title: *In re Estate of Crain*, 2023-Ohio-571

Court : 11th Appellate District, Trumbull County

Date: February 27, 2023

Denial of plaintiffs-heirs' motion to vacate the court's judgment approving and settling the fiduciary's final account in father's estate after defendant-brother was found guilty in underlying concealment action was not error where plaintiffs never asserted a fraud claim against defendant, the guilty verdict under R.C. 2109.50 showing that defendant concealed property from the estate did not require fraudulent or criminal intent and was not functionally equivalent to a finding of fraud under R.C. 2109.35(A), and the court fully explained its reasoning for denying the motion to vacate

Trusts

Issue: Trust Construction

Title: *Boli v. Huntington Natl. Bank, Trustee*, 2023-Ohio-3308

Court: 5th District, Stark County

Date: September 18, 2023

Upon death of settlor, trust makes settlor's two daughters income beneficiaries. Upon the death of either daughter: "If either daughter dies without issue surviving, her part shall go to her sister or that sister's issue subject to the provisions of this trust." One of the daughters dies without issue. Surviving daughter argues that the deceased-siblings share of the principal should be distributed to her. The only language in the trust on principal distribution is to the surviving daughter's son under specific circumstances. The trial court granted summary judgment that the trustee properly administered the trust by not disbursing the deceased daughter's share of the principal

upon her death, but she was now the income beneficiary for that principal. Appellate court affirmed.

Issue: Trust Construction

Title: Farmers Trust Co. v. Lake Erie College, 2023-Ohio-4745

Court: 7th District, Mahoning County

Date: December 20, 2023

In 1993, a settlor created a trust which established a foundation to annually distribute net income equally between eight charitable beneficiaries. If one of the charitable organizations merged or became part of another organization, then, so long as the work was carried on, the successor charitable organization would receive the prior organization's beneficial share. If one of the charitable organizations dissolved, then the net income would be divided among the remaining beneficiaries. If a charitable organization converted to a for-profit, then the organization would be treated as dissolved. One of the original beneficiaries was the Ohio Presbyterian Home, commonly known as Park Vista.

In 2016 or 2017, Park Vista was acquired by the Ohio Living Foundation and treated as a successor beneficiary. In 2020, the Ohio Living Foundation sold Park Vista to Natick HCG, LLC, a for-profit company. Though it no longer owned or operated Park Vista, the Ohio Living Foundation contended that it continued to serve the residents of Park Vista through various programs. In September 2020, the trustee filed for declaratory judgment with the probate court to determine if the Ohio Living Foundation was eligible to continue receiving distributions. The probate court granted summary judgment to the Ohio Living Foundation because the trust identified Park Vista as "presently of 1216 Fifth Avenue, Youngstown, Ohio," meaning the settlor intended the beneficial share to go the entity continuing the work of the Ohio Presbyterian Home at any future location.

The appellate court disagreed. The word "presently" in the trust was to specify which Park Vista was the beneficiary because the name could be shared among multiple facilities with different

owners. Park Vista, the retirement facility itself, was the trust beneficiary, and the organization owning Park Vista was entitled to distributions only as the operator. The operator of Park Vista is now a for-profit company and must be treated as dissolved. Judgment reversed and summary judgment granted to the trust.

Issue: Trust/Settlement Agreements
Title: In re Roudebush Trust, 2023-Ohio-2281
Court: 7th District, Carroll County
Date: June 28, 2023

Real estate was owned by a trust. In 2002, an adjoining property was purchased by Appellees. A dispute arose between Appellees and the trust beneficiaries over a driveway and boundary lines, causing a lawsuit to be filed. In February 2018, the Second Trustee and Appellees reached a settlement agreement, which was approved by the probate court. The trust beneficiaries appealed, and the appellate court reversed and remanded the settlement approval because it was disproportionate and did not benefit the beneficiaries. The common pleas court then set the matter for trial.

On January 6, 2020, the Second Trustee informed the trust beneficiaries that trust counsel withdrew and he was retaining new counsel. The terms of the trust allowed him to assess retainer costs to the beneficiaries and demanded \$3,500.00. The beneficiaries objected and the Second Trustee filed a motion to compel payment. The Successor Trustee also entered into a second settlement agreement before trial. The probate court approved the second settlement agreement and the motion for payment, ordering the beneficiaries to pay \$4,600.

The terms of the second settlement agreement are that the trust will relocate the last 30 feet of the driveway onto its property, pay \$739.53 of the relocation expense, and reimburse Appellees the remaining relocation expense from oil and gas royalties. In exchange, all parties would release or dismiss the remaining claims. The appellate court found that the second settlement agreement still provides no benefit to the beneficiaries because the only remaining claim was the trusts counterclaim for adverse possession; Appellees had already dismissed their claims after a partial win on the merits. In other words, the trust was financially obligating itself to Appellees and waiving a potentially valid claim in exchange for release from a claim which had already been dismissed. The Second Trustee also did not consult with the beneficiaries before entering the settlement after erroneously concluding that the trust and beneficiaries lacked the resources to continue litigation, when the beneficiaries were in fact prepared to pay litigation expenses. Accordingly, the appellate court found the reasons for the Second Trustee's entering into the settlement agreement to be without merit and reversed the trial court's approval.

The probate court affirmed the trial court's decision to allow Appellees to intervene because they are parties to the second settlement agreement.

Payment of a trust's attorney fees may be granted when the trustee's actions are for protecting the trust's assets. Since the second settlement agreement was found not to

be in the trust's or the beneficiaries' interest, the appellate court found that the entry granting the motion to compel the beneficiaries to pay attorney fees was an abuse of discretion and reversed.

Issue: Trusts/Representation

Title: Tax Ease Ohio II, L.L.C. v. Cramer, 2023-Ohio-4067

Court: 8th District, Cuyahoga County

Date: November 8, 2023

Trustee is a formerly licensed attorney who had her license indefinitely suspended in 2020. A trust property was foreclosed on and trustee file a pro se challenge. Appellate court found that a non-attorney filing on behalf of a trust is the unlicensed practice of law and dismissed the appeal.

Issue: Trusts/Reformation/Termination/Breach of Duty/Undue Influence

Title: Meehan v. Meehan, 2023-Ohio-2772

Court: 8th District, Cuyahoga County

Date: August 10, 2023

Tom and Donna were the parents of Marcia, Tim, Patrick, and Mike. Tom and Donna owned a residence and a farm. The couple had individual trusts, wills, and powers of attorney; both powers of attorney named Marcia as agent.

In 2011, Tom and Donna learned the farm had significant oil and gas value. The two formed a company, T&P, to hold title to the farm. Ownership of T&P was divided equally between Tom and Donna and Marcia was named manager. Between 2011 and 2018, T&P generated over \$1.6 million in royalties. Marcia was the only one with access to the T&P bank accounts.

Tom died on August 7, 2012, and Donna became trustee of his trust. Marcia then opened several credit cards in her own name and a bank account at 5/3 Bank in her and Donna's name. Donna's social security checks and the distribution checks from T&P were paid into the 5/3 account, which Marcia used to pay her and Donna's expenses (Marcia and Donna were living together.) The mortgage payments on the residence were also paid from the 5/3 account.

Over the next five years, significant expenditures and gifts were paid from the gas royalties. Despite royalty income of over \$1.6 million, in 2017 the balance of the T&P account was approximately \$65,000.00. In 2017, Donna's declining health demanded her placement in a nursing facility. All parties were concerned that Donna lacked sufficient funds to pay for care.

In 2018, Donna executed a new will and trust. The new trust names Tim and Marcia as co-trustees, with Tim as trust advisor and managing trustee. Donna died shortly after. In March 2019, Marcia filed for declaratory judgment to invalidate the 2018 trust and to be named trustee. Marcia also filed a will contest against the 2018 will. Tim, as trustee of the 2018 trust, filed counterclaims, including breach of fiduciary duty, conversion, unjust enrichment, and interference with expected inheritance. The trial court granted the counterclaims and ordered Marcia to pay damages of \$414,724.79. Marcia's assignments of error are addressed below.

1. Reformation of Donna's 2018 trust due to a mistake in law

R.C. 5804.15 allows a court to correct errors of mistake of fact or law in a trust upon clear and convincing proof of a settlor's intent and that a mistake of fact or law affected the terms of the trust in expression or inducement. Donna's 2018 trust was erroneously dated and signed by Donna as an individual and not a trustee. The 2018 reformation allowed for the funding of the trust by transfer of T&P shares owned by Donna as trustee of Tom's trust. Without the transfer, the 2018 trust would be invalid for lack of funding.

The only change between the prior trust and the 2018 trust was ending the disinheritance of Mike. The other three children's beneficial interests remained unchanged, as was the intention of keeping the farm in the family even if Donna needed to pay for long-term care facilities. The drafting attorney evaluated Donna for capacity and undue influence during their meetings, and the record clearly and convincingly showed Donna's intent in the changes.

The record also clearly and convincingly showed that Marcia irresponsibly handled the gas royalties and refused to cooperate with Tim as co-trustee. Among other things, the drafting attorney testified that Donna was upset about Marcia living in the residence rent free after Donna moved into a nursing home, that Marcia had expressed openness to selling the farm contrary to Donna's wishes, and that he had discussed with Donna the need for oversight of her finances.

The appellate court found that Donna clearly and convincingly intended to create the 2018 trust and convey all the T&P shares owned by Tom's trust to it. Donna's signing the transfer of the shares as beneficiary and not as the trustee-owner of the shares was a mistake of fact or law. Assignment of error overruled.

2. Termination of Tom and Donna's earlier trusts

R.C. 5804.11(D) allows a court to modify or terminate a noncharitable trust when the beneficiaries do not all agree only if (1) the court is satisfied that if all of the

beneficiaries had consented, the trust could have been modified or terminated under this section; and (2) the interests of a beneficiary who does not consent will be adequately protected.

Donna did not agree with the termination of Tom and Donna's earlier trusts. A noncharitable trust may be terminated upon the consent of all beneficiaries if the court concludes that the continuation of the trust is not necessary to achieve the material aims of the trust. R.C. 5804.11(B). A finding of purpose generally requires a showing of a particular concern or objective. *Vaugh v. Huntington Natl. Bank*, 2009-Ohio-598. Here, testimony showed the material purpose of Tom's trust was to ensure support for Donna's health and maintenance, protect assets from claims, and leave the remainder after Donna's death to Pat, Marcia, Tim, and Mike's children (Mike was disinherited.) The terms of Tom's trust are consistent with these purposes. Accordingly, the court found that the requirements of R.C. 5804.11(B) for termination of the trust were met.

Upon Tom's death, the trust became irrevocable; Donna became beneficiary and successor trustee; and Tim, Marcia, Pat, and Mike's children became successor beneficiaries. The court found that the express terms of Tom's trust did not prohibit modification or termination.

Finally, Marcia's 25% interest in the remaining trust did not change between the earlier trusts and the 2018 trust. Therefore, the requirements of R.C. 5804.11(D) were met, the termination of Tom's trust was proper, and Marcia's assignment of error dismissed.

3. Undue influence

R.C. 5804.06 adopts the undue influence standards from will contest actions for the purpose of determining the validity of a trust. Prior declarations are admissible to show mental capacity, susceptibility to extraneous influence, and feelings, intentions, and relations. *Haddad v. Maalouf-Masek*, 2022-Ohio-4085.

Evidence presented to the court shows that Donna and Mike had reconciled; that Donna wished to keep the farm in the family; that Donna met with the 2018 drafting attorney privately multiple times and asked questions; and that Marcia sent a letter to the others acknowledging Donna's capacity. The court found that Donna was not a susceptible testator and that the new will and trust were consistent with Donna's expressed wishes. Marcia offered no credible evidence to the contrary. The court also found no convincing evidence that undue influence was exerted on Donna. Marcia's assignment of error was dismissed.

4. Fiduciary duties

Tim, Pat, and Mike had standing to sue for breach of fiduciary duty because the funding for the 2018 trust would revert to Donna's estate if declared invalid and all three would then have standing to assert R.C. 2109.50 claims.

Marcia assumed the duty of Donna's fiduciary when she began writing checks on Donna's behalf from the 5/3 account, which was opened primarily for Donna's benefit. The appellate court found Marcia's argument that she was not a fiduciary to be disingenuous. Here, the power of attorney expressly limited Marcia's ability to make gratuitous transfers. Despite this, Marcia transferred Donna's funds for her benefit. Accordingly, Marcia breached her duty as power of attorney.

A manager of an LLC owes fiduciary duties to the LLC and its members. The manager's duties are defined in the operating agreement and R.C. 1705. Among those duties are best interest, avoidance of conflicts of interest, and prohibitions on self-dealing. Here, Marcia engaged in transactions as manager for her own benefit; failed to exercise reasonable care, skill, and diligence in managing T&P's finances; made significant expenditures without proper documentation or accounting; paid her personal expenses from T&P's accounts; and, instead of opening a trust checking account, deposited the income checks into a joint account between herself and Donna. The appellate court found these facts to be ample evidence of a breach of fiduciary duty as a manager.

The trial court determined that \$290,613.14 in unaccounted for funds were withdrawn from T&P's accounts with an additional \$70,636.00 in gifts and IRA deposits Marcia made to herself. Marcia was T&P's manager and the operating agreement explicitly made her personally liable for money damages. The power of attorney only authorized Marcia to make gifts to herself with limits. In considering this, the trial court did find that some of the gifts were proper when there

was sufficient evidence that Donna was aware of and approved the gift. Given the fiduciary and confidential relationship between Marcia and Donna, the gifts were viewed with suspicion and Marcia did not rebut this presumption in all cases.

A medical diagnosis from the nursing home was properly excluded because the nursing home was closed at the time of trial and the authenticating witness testified they did not make the records.

Marcia's relevant assignments of error were dismissed.

5. Misfiled answer

On August 8, 2022, the trial court discovered that appellees had misfiled their answers and counterclaims in the wrong cases and ordered a correction. The court found Marcia was not prejudiced by the correction. The appellate court found that R.C. 2101.11 designates probate judges as both clerk of court and judicial officer; while a clerk may not correct a misfiling, a judicial officer may exercise their authority to correct the record. Marcia's assignment of error was dismissed.

6. Final assignments

The court dismissed Marcia's assignment of error that the trial court improperly found she was required to separate T&P's income into trust share's and limit her use of Tom's trust for failure to set for a legal basis for the claim.

The court also dismissed Marcia's assignment of error that Donna was the sole member of T&P after Tom's death as moot.

Issue: Trusts/Enforcement of Settlement Agreement

Title: Geis v. Markling, 2023-Ohio4506

Court: 9th District, Summit County

Date: December 13, 2023

Ms. Geis filed a complaint against Mr. Markling in his individual capacity, as trustee, and as executor for breach of trust, fraud, conversion, and removal. Through counsel, CPM, Mr. Markling filed a motion to dismiss. Shortly thereafter, CPM filed an expedited motion to withdraw which was contested by Mr. Markling. The court denied the motion to dismiss and set the matter for mediation. Following mediation, a memorandum of understanding was signed by all parties. Ms. Geis moved for the MOU to be adopted by the court as an order; Mr. Markling did not oppose the motion. In adopting the MOU, the court incorporated the MOU as an order of the court and dismissed the claim and counterclaim with prejudice. Subsequently, Mr. Markling filed a notice of satisfaction that Mr. Markling and the other defendants have satisfied their requirements under the MOU but Ms. Geis has not.

Mr. Markling then appealed the trial court's order denying the motion to dismiss, the order allowing CPM to withdraw, and the adoption of the MOU by the court. Generally, an MOU is viewed as a contract. Here, the terms of the MOU were clear, the MOU was signed by all the

parties, it was adopted by the court after sufficient notice, the initial adoption was not contested, and Mr. Markling filed a notice of satisfaction for his requirements under

the MOU. On these facts, the appellate court did not find that the trial court erred in adopting the MOU.

The appellate court found that the adoption of the MOU rendered the assignment of error against the motion to dismiss moot.

As to the expedited motion to withdraw, the court found that Mr. Markling was not prejudiced by CPM's withdrawal. Specifically, Mr. Markling's new counsel had already filed motions, the case was in early stages, and Mr. Markling and CPM had a fundamental disagreement as to the direction of the litigation, causing an adversarial relationship. The assignment of error was dismissed.

Issue: Trusts/Breach/Constructive Notice
Title: Carrick v. Deadman, 2023-Ohio-4295
Court: 10th District, Franklin County
Date: November 28, 2023

[Trial court case heard in the Franklin County Court of Common Pleas, General Division under concurrent jurisdiction]

A trust established on December 21, 1983, consisted of Limited Partnership Units of a company called Kents Run, with separate funds for the settlor's three children: Carrick, Neal, and Deadman. The settlor died in 2006. The trust's distributions would go to the three children equally, with the trustee, Deadman's husband, receiving 0.27%.

Between December 1983 and January 1984, Carrick signed documents entitled "waivers of notice regarding his right to withdraw funds from the Trust." Carrick had also received a number of checks from the trust amounting to over \$425,000.00. R.C. 5810.05(C) sets a four-year statute of limitations for claims by a beneficiary for breach of trust, including for "[t]he time at which the beneficiary knew or should have known of the breach of trust." "[C]onstructive knowledge of facts, rather than actual knowledge of their legal significance is enough to start the statute of limitations running under the discovery rule." *Cundall v. U.S. Bank*, 122 Ohio St.3d 188, 2009-Ohio-2523. The appellate court affirmed the trial court's finding that Carrick had constructive notice of the trust.

With constructive notice of the trust, Carrick did not require a copy of the trust agreement for the statute of limitations period to begin. Rather, the period began when the beneficiary would be aware of the facts giving notice of a breach of trust. On

March 1, 2013, a final check of \$ 1,064 was written to Carrick and the trustee alerted Carrick that \$100 needed to remain in the brokerage account for it to stay open; the present fund at that time was \$100.40. That notice alerted Carrick to the depletion of his trust fund and any potential breach by the trustee. As the complaint was filed more than four years after Carrick received notice on March 1, 2013, Carrick's claims were barred by the statute of limitations. The trial court's granting of summary judgment was affirmed.

Issue: Trust/Real Property
Title: *Wynn v. Crumm, 2024-Ohio-1447*
Court: 1st Appellate District, Hamilton County
Date: April 17, 2024

In plaintiff-beneficiary's action against defendant-trustee, seeking to prevent sale of real estate held in trust, trial court erred in finding that defendant was required to distribute real estate to beneficiaries in-kind where the unambiguous terms of the trust agreement granted defendant discretionary authority to sell real property and to make distribution in money or in-kind, and discretionary powers did not inherently conflict with defendant's fiduciary duties under the trust agreement, R.C. 5801.04.

Issue: Jurisdiction
Title: *Hadjuk v. Rusnak, 2024-Ohio-339*
Court: 8th District, Cuyahoga County
Date: February 1, 2024

In siblings' declaratory judgment and accounting action against defendant-sister, alleging that she had exerted undue influence over decedent-father and breached her duties as trustee, judgment in favor of siblings is affirmed where probate court had subject-matter jurisdiction pursuant to R.C. 2107.11 because father was domiciled in that county until death, sister's closing statement was appropriately limited because she was making new claims that did not include summation of her case, and sister failed to show any error in the manner in which the hearing was conducted.

Guardianship

Issue: Guardianship Land Sale/Service

Title: Hunter v. Crumrine, 2023-Ohio-4784

Court: 5th District, Ashland County

Date: December 28, 2023

Guardianship possesses an undivided one-half interest in real estate. The guardian initiates a land sale action because the ward's income is insufficient to pay the ward's monthly obligations. The complaint lists "Eugene Blain" as a defendant, the owner of the other undivided one-half interest in the real estate. A process server personally served Eugene Blain on December 11, 2022.

On February 10, 2023, the guardian filed for default judgment, which was granted six days later. No appeal was filed. On April 3, 2023, Blain filed a Civ.R. 60(B) motion with the following fact statements: "[I]n the early part of December 2022, he was handed paperwork from the Ashland County Probate Court; he was unaware of any probate issues or matters involving him; the paperwork was addressed to 'Eugene Blain,' not his legal name of 'Edward Eugene Blain' and thus he disregarded the paperwork; on March 31, 2023, he encountered a realtor putting 'for sale' signs on the property; he did an online search and discovered a judgment entry issued on February 16 against 'Eugene Blain'; he has legal title to fifty percent of the real estate; he has never consented to the sale of the real estate; and the probate court does not have jurisdiction to order a sale."

The trial court found that Blain lacked excusable neglect because he received notice but chose to ignore it. The court also found that Blain lacked a meritorious defense because his consent was not statutorily required as a 50% owner. Appellate court affirmed.

Issue: Guardianship

Title: In re Guardianship of Pond, 2023-Ohio-2492

Court: 5th District, Delaware County

Date: July 19, 2023

The majority of the ward's assets are held in her trust ("Mary's trust") and the trust of her deceased husband ("Robert's trust"). Prior to the guardianship being established, the ward's son, Dr. Pond, was successor trustee of both trusts. In 2021, attorney Adriann McGee was appointed guardian of the estate. Attorney McGee used her

authority as guardian to file motion to exercise her ward's beneficiary authority to remove Dr. Pond as successor trustee of Mary's trust and appoint a successor. The motion was granted on February 18, 2022, and Attorney McGee removed Dr. Pond and appointed attorney Thomas Taneff was appointed successor trustee of Mary's trust. Dr. Pond did not timely appeal the February 18, 2022, judgment entry.

Before his removal as successor trustee, Dr. Pond liquidated assets in both trusts' investment portfolios and used the funds to purchase \$3.1 million in physical gold from American Hartford Gold Group in Dr. Pond's individual name. The division of the gold was split between the two

trusts. The gold was set to be delivered in installments. The first shipment valued at \$640,000 was allegedly received and stored in a safe in the ward's home. The second shipment valued at \$80,000 was lost by UPS. A claim on the amount was allegedly collected by Dr. Pond, who remains in possession of it. When the guardianship actions were initiated, American Hartford ceased shipment of the remaining \$2,340,000 until a court order directed it to the proper receiving party.

The ward's liquid assets had been depleted to a level no longer sufficient to pay for the ward's care. Accordingly, Attorney McGee moved the trial court to order American Hartford to release 20% of the ward's share of the remaining gold to pay for her care and maintenance. Attorney McGee also alleged Dr. Pond co-mingled assets. The trial court approved the partial distribution and ordered American Hartford to make the distribution within fourteen days to Attorney Taneff. Dr. Pond objected to the ordered distribution by contesting the court's recognition of Attorney Taneff as successor trustee and authorizing him to receive the distribution.

As Dr. Pond did not directly challenge the distribution, instead arguing Attorney Taneff was not legally the successor trustee, the appellate court did not have to rule on the appropriateness of the distribution. Instead, the appellate court found that Dr. Pond did not timely appeal the February 18, 2022, judgment entry authorizing Attorney McGee's use of authority on her ward's behalf to remove Dr. Pond and appoint a successor trustee. Accordingly, *res judicata* barred Dr. Pond from challenging Attorney Taneff's appointment as successor trustee or his ability to receive the distributions from American Hartford.

Dr. Pond also maintained that throughout the guardianship proceedings some of his personal property was located at the ward's residence. The trial court ordered Attorney McGee to make a written inventory of all personal property in the ward's residence which could be attributed to Dr. Pond and for Dr. Pond to remove said property so that Attorney McGee could secure the ward's assets.

The appellate court ruled that the trial court had authority to order Dr. Pond to remove his personal property from the ward's residence. Guardians have a duty to protect and manage a ward's real and personal property. R.C. 2111.14. Attorney McGee needed to separate the ward's property from Dr. Pond's in order to fulfill her guardianship responsibilities. Therefore, the appellate court found that the trial court's order for the written inventory and for Dr. Pond to remove his property was not an abuse of discretion.

Dr. Pond's fifth, sixth, and seventh assignments of error were predicated on motions the trial court had yet to rule on. The appellate court dismissed those assignments of error for lack of a final, appealable order.

Dr. Pond's final assignment of error was not considered because Dr. Pond's brief violated the court's local rules and the Rules of Appellate procedure by having a smaller than 12-point font, being single spaced, and exceeding the 30-page limit. The appellate court disregarded those arguments on pages past 30, including the final assignment of error.

Issue: Vexatious Litigator

Title: In re Guardianship of Pond, 2023-Ohio-2190

Court: 5th District, Delaware County

Date: June 29, 2023

Guardian filed a motion with the probate court for authority to file a suit against one of the ward's children to have him declared a vexatious litigator. The motion was granted. The alleged vexatious litigator appealed the entry approving the motion. The appellate court found that an entry allowing a guardian to file suit for vexatious litigation was not a final, appealable order and dismissed the appeal.

Issue: Guardian/Property/Sale

Title: *Hunter v. Crumrine*.2023-Ohio-4784

Court : 5th Appellate District, Ashland County

Date: December 28, 2023

In plaintiff-guardian's action against defendant-co-owner of ward's property, seeking its sale for support and maintenance of ward, resulting in default judgment, trial court's denial of defendant's motion for relief from judgment is affirmed where defendant did not file a timely appeal, he failed to show excusable neglect pursuant to Civ. R. 60(B)(1) because he had actual notice of plaintiff's complaint, even though his full name was not listed on the pleadings, and

R.C. 2127.08 allowed for the sale of property because defendant's undivided interest was protected by the proceeds of sale.

Issue: Guardianship/Frivolous conduct
Title: *In re Guardianship of Bakhtiar, 2024-Ohio-1208*
Court : Ninth Appellate District, Lorain County
Date: March 29, 2024

In guardianship action in which the guardian of ward's person and estate filed a motion for sanctions against appellants-attorneys and ward's son for continually raising frivolous and baseless defenses before the trial court, the court did not err in awarding sanctions where evidence shows that appellants' numerous repetitive filings lacked evidentiary support and created undue delay and increased costs in litigation and that appellants' behavior constituted willful conduct that served on to harass and injure guardian and ward, R.C. 2323.51, Civ. R. 11.

Issue: Guardian/Appointment/Findings/Objections
Title: *In re Guardianship of Vonallmen, 2024-Ohio-331*
Court : 5th Appellate District, Tuscarawas County
Date: January 31, 2024

In application for appointment of guardian of appellant-alleged incompetent person, trial court did not err in appointing guardian where magistrate's general decision to issue letters of guardianship was allowed pursuant to Civ.R.53(D)(3) because appellant did not initially request findings of fact and conclusions of law, detailed findings were included in the judgment entry after appellant made a request following hearing, and appellant's objections enabled trial court to evaluate magistrate's decision and ensure compliance with the law, R.C. 2111.02

Issue: Accounting/Creditor/Government benefits
Title: *In re Guardianship of LaRue, 2024-Ohio-692*
Court : 12th Appellate District, Clermont County
Date: February 26, 2024

In nursing home's action against resident's guardian for failure to secure government health benefits for resident, probate court erred in declining to hold a hearing to approve guardian's final accounting of estate where nursing home was a creditor of the estate and was authorized to file exceptions to guardian's account pursuant to R.C. 2109.33, guardian had the duty under R.C. 2111.14(A)(3) to pay all just debts, including nursing home charges, and guardian's duty included having an obligation to make timely application for government benefits.

Involuntary Civil Commitment

Issue: Civil Commitment/Forced Meds
Title: *In re C.G., 2023-Ohio-4239*
Court: 6th District, Lucas County
Date: November 22, 2023

Appellant called 911, seeking help for herself and her children because she believed a repairman sent by her landlord had contaminated her home with a pool of chemicals that contained LSD. Throughout that day, police officers, rescue personnel, and staff from the Zepf Center, a behavioral health center, came to appellant's home, investigated her claims, and eventually transported appellant to the emergency room, where she was “pink slipped” and referred to St. Charles Hospital for a mental health evaluation. Appellant was alleged to be extremely paranoid including making bizarre statements and was asking them to remove poisonous cats from the porch. Appellant was reportedly living in deplorable conditions with her 2 children in the house. Appellant admitted that she has been smoking excess cannabis lately. Appellant found to be mentally ill person in need of treatment and involuntary commitment ordered. Probate court also found Appellant lacked capacity to give consent by clear and convincing evidence, and ordered medication for a period not to exceed 60 days. Appellant did not object to the probate court judge but filed an appeal.

Held: Both Civ.R. 53 and R.C. 5122.15 permit a magistrate to preside over hearing and prepare a written decision in the proceedings. Because R.C. 5122.15(J) permitted the magistrate to hear the matter and enter a written decision, and the judge immediately adopted that decision in a judgment entry, no merit in appellant's argument that magistrate may not enter a judgment entry.

To demonstrate plain error, appellant must identify (1) a deviation from a legal rule, (2) that the error was obvious, and (3) that the error affected the basic fairness, integrity, or public reputation of the judicial process and therefore challenged the legitimacy of the underlying judicial process.

In making a determination whether a person is a “mentally ill person” under the statute, courts apply a “totality of the circumstances” test, balancing “the individual's right against involuntary confinement in deprivation of his [or her] liberty, and the state's interest in committing the emotionally disturbed.” While the statute grants courts broad discretion to consider an individual's history in determining the present mental condition, some factors for consideration, include the risk of physical harm to self or others, the medical testimony regarding the present condition of the person, whether the person has insight into their condition so that they will avail themselves of treatment, the grounds for commitment stated in the affidavit, and any past history that indicates the person's potential compliance with treatment.

In considering least restrictive alternative to in patient hospitalization, court is required to consider factors in R.C. 5122.15(E). No number of alternatives must be considered but if in patient hospitalization is least restrictive alternative required, the court shall state so in its order.

Courts recognize a compelling government interest to permit physicians to administer antipsychotic medication to an involuntarily committed mentally ill patient who poses an imminent threat of harm to self or others. *Id.* at 183-184, 736 N.E.2d 10. An additional state interest recognized by courts permits forced medication when the patient lacks capacity to make an informed decision regarding their treatment.

Determination regarding court-ordered medication is separate from the determination for involuntary commitment, as “a court's determination that a person is mentally ill and subject to involuntary commitment in a hospital is not equivalent to a finding that the person is incompetent.” (citations omitted) *Steele*, 90 Ohio St.3d at 186, 736 N.E.2d 10. Moreover, the fact that the probate court found hospitalization was the least restrictive alternative and ordered commitment “does not even raise a presumption” of incompetence for purposes of court-ordered medication. *Id.* at 187, 736 N.E.2d 10, citing *In re Milton*, 29 Ohio St.3d 20, 22-23, 505 N.E.2d 255 (1987). Before ordering medication, a probate court must find, by clear and convincing evidence, that a patient “lacks the capacity to give or withhold informed consent regarding treatment.” *Id.* at 187, 736 N.E.2d 10. Affirmed.

Disinterment

Issue: Disinterment/Frobose Factors

Title: In re Disinterment of Glass, 2023-Ohio-3509

Court: 2nd District, Montgomery County

Date: September 29, 2023

Roger filed two applications for disinterment for his parents’ remains. One sister, Carol, consented to the disinterment but the other sister, Kathleen, opposed. Mediation failed. A trial on the applications took place from August 9-12, 2022. Following the trial, the probate court allowed post-trial briefs to be filed 14 days after transcripts were available; the parties would then have an additional 10 days after service of the post-trial brief to file responses. Kathleen later filed a motion to strike the applicant’s post-trial brief or to reopen evidence. Kathleen’s motion was denied. The applications for disinterment were approved.

1. Evidence from settlement negotiations

In its decision approving the disinterment, the court found Kathleen’s conduct to be “nothing short of obstructive, heartless and damaging.” In reaching this conclusion,

the court relied on evidence that Kathleen may have signed the waiver for disinterment before litigation had begun if certain conditions were met.

Generally, statements made during settlement negotiations are not admissible evidence. However, statements may be admitted to show bias or prejudice, undue delay, or motive. Evid.R. 408.

Here, Roger wished to construct a family mausoleum with room for himself and his parents. When informed of the plan, Carol asked for space for her family as well and the number of spots in the mausoleum expanded to eight. At all points during the negotiation, the ability to expand the mausoleum to include Kathleen's family existed. Emails were exchanged between Roger, Kathleen, and their attorneys. There were offers of money and mausoleum expansion.

During the trial, Kathleen initially tried to introduce the evidence as a mere "conversation" between the parties and not a settlement; it was Roger that tried to exclude the evidence. However, when Kathleen was cross-examined by Roger's attorney, Kathleen's attorney then objected and tried to frame the evidence as being part of a settlement. Similar incidents continued through the trial, with the trial court finding that Kathleen's support for admitting the evidence was nakedly premised on whether the information would benefit her at the time. Based on these facts, the trial court found that Kathleen waived her objection to the admission of the settlement statements. The appellate court agreed and the assignment of error dismissed.

2. Waiver of right to seek disinterment

R.C. 517.24 does not have a statute of limitations or waiver. However, Kathleen argued that Roger and Carol waived their right to disinterment for not bringing the applications until 16-20 years after their parents' deaths.

The delay was because, for a long stretch of that time, the construction of the family mausoleum would not have been possible under the cemetery's rules. There is also no bad faith argument by the applicant nor would there be any acute pain caused by the relocation. The trial court found waiver did not apply. The appellate court agreed.

3. Granting the application for disinterment

The trial court analyzed the application under the seven-part test outlined in *In re Disinterment of Frobose*, 2005-Ohio-5025. The non-exclusive list of factors are: "(1) the degree of relationship that the party seeking reinterment bears to the decedent, (2) the degree of relationship that the party seeking to prevent reinterment bears to the decedent, (3) the desire of the decedent, (4) the conduct of the person seeking

reinterment, especially as it may relate to the circumstances of the original interment, (5) the conduct of the person seeking to prevent reinterment, (6) the length of time that has elapsed since the original interment, and (7) the strength of the reasons offered both in favor of and in opposition to reinterment.”

The trial court found that the first two factors were neutral. Of the remaining factors, the trial court found that factor three weighed in favor of disinterment; factors four, five, and seven weighed heavily in favor of disinterment; and factor six weighed against disinterment but was not significant. The appellate court reviewed the entire record and found the trial court had competent and credible evidence for reaching its conclusion. The assignment of error was dismissed.

4. Denial of motion to strike

According to Kathleen, the petitioner’s post-trial brief contained material misrepresentations of fact, and the trial court erred in denying her motion to strike the post-trial brief without a hearing. Despite her prior claim that settlement offers were inadmissible evidence, Kathleen attached two settlement offers to her motion to strike. In addition, the court could not find any misrepresentation of the testimony presented at trial in the post-trial brief and there was no need to reopen because the evidence was duplicative to evidence already presented.

The motion also alleged frivolous conduct under R.C. 2323.51. A motion for frivolous conduct only requires a hearing before the award of attorney fees; a hearing is therefore not always required. Taken altogether, the appellate court did not find that the trial court erred in denying the motion and not conducting a hearing.

Trial court decision affirmed in its entirety.

Issue: Disinterment/Notice/Timeliness of 60(B)

Title: Jasper v. White, 2023-Ohio-2358

Court: 3rd District, Marion County

Date: July 10, 2023

Petitioner for disinterment of four family members wished to transfer the remains to 36 adjacent lots at Marion Cemetery to create a family burial plot, per the alleged wishes of his deceased mother. At the time of the petition, the remains were interred at different locations in Marion

Cemetery and Chapel Heights Memory Gardens Cemetery. In the petition, Petitioner listed four or five next of kin entitled to notice, but all were pre-deceased. With no living individuals entitled to notice, the probate court granted the petition for disinterment and ordered the remains interred at Marion Cemetery at Petitioner's expense. The remains were then moved.

Then, without using the statutory disinterment process, Petitioner then moved two more sets of remains to the family plot.

Next of kin entitled to notice of disinterment remain alive. A year after the disinterment, when one of those family members went to visit her mother's grave at Chapel Heights, she discovered that her mother no longer remained in her grave. The other disinterments were then discovered. The living next of kin filed a motion to intervene in the four disinterment actions and for declaratory judgment for all six sets of remains. After granting the motion to intervene, the court granted a Civ.R. 60(B) motion for relief from judgment, and finding the motion timely under Civ.R. 60(B)(5). The court also found that Petitioner knew he needed court permission to disinter remains, and that he knowingly moved the two later remains without court order. Therefore, the court vacated the entries granting the disinterment. The matter was then set for hearing.

After applying a multi-part test, the trial court found that Petitioner failed to meet his burden of showing good cause for the disinterment. The court also denied an award of attorney fees to the next of kin, as attorney fees generally not awardable in a declaratory judgment. Ultimately, the court ordered that the remains be returned to their original burial plots, at Petitioner's expense. The appellate court affirmed the trial court's decision on all grounds.

[Name Changes and Birth Record Corrections](#)

Name Change/Birth Record Corrections

Issue: Adult Name Change/Common Law Marriage

Title: In re Rohlik, 2023-Ohio-4875

Court: 11th District, Lake County

Date: December 29, 2023

Ms. Rohlik, an adult, filed an application to change her last name to that of her domestic partner, Bangerter. The trial court denied the application because it was effectively a request to validate a common law marriage. Ms. Rohlik otherwise

satisfied the statutory requirements to grant an adult name change, but the court found that Ms. Rohlik did not present a reasonable and proper cause for the change.

Ms. Rohlik and her partner co-habitat in real property they co-own and have performed a ceremonial marriage, but have declined to get legally married for financial reasons.

The appellate court found that the trial court abused its discretion in denying the name change application because: 1) no evidence was presented to the court that Ms. Rohlik and her partner intend to hold themselves out as legally married; sharing a last name does not imply marriage; even if a cohabitating partner's name implies marriage, it does not imply common law marriage; common law marriage has been abolished effective October 10, 1991, denying Ms. Rohlik and her partner any legal privilege from the name change; and because the court's decision is contrary to Ohio Supreme Court precedent. Trial court's decision was reversed and remanded.

Issue: Birth Correction/Gender Marker Change

Title: In re B.C.A., 2023-Ohio-2931

Court: 11th District, Lake County

Date: August 21, 2023

[Similar matter currently awaiting holding by Ohio Supreme Court, In re Application for Correction of Birth Record of Adelaide. Oral arguments already held.]

Parents applied for a sex marker change on their minor child's birth record from male to female. The probate court denied the application because it concluded the court lacked statutory authority under R.C. 3705.15. The statute allows birth record corrections when the registration of birth "has not been properly and accurately recorded[.]"

The appellate court affirmed the trial court's decision. Specifically, the appellate court found that the statute allows for corrections, i.e., the statute only allows alterations to a birth record that reflect circumstances existing at birth. The statute would not allow an amendment to a birth record to reflect gender dysphoria later in life.

Issue: Minor Name Change

Title: In re Name Change of L.J.T. to L.J.S., 2023-Ohio-2929

Court: 11th District, Lake County

Date: August 21, 2023

Mother filed an application to change Minor's name from L.J.T. to L.J.S. Father objected to the surname change. The probate court granted the application. At the hearing on the application, the following facts were established:

- 1) Mother is the residential parent and Minor identifies closely with her side of the family;
- 2) Mother and Father were never married;
- 3) Minor's stepbrother, who lives with them; shares Mother's surname, making Minor asking questions about his surname;
- 4) Minor and the stepbrother go to school and other activities together, causing confusion with their different surnames;
- 5) If Mother marries, she will not change her surname;
- 6) Father only currently pays child support because his wages are garnished;
- 7) The name change would not alienate or effect Father's relationship with the minor;
- 8) Father objected to the change because "I'm his father. And that was the name he was born with."

The appellate court reviewed the probate court's decision and found the lower court thoroughly explained its reasoning in granting the application based on the factors in *In re Willhite*. The probate court's decision was affirmed

Disqualification

Issue: Judicial Disqualification/Attorney Standing

Title: In re Disqualification of Gallagher, 2023-Ohio-2977

Court: Supreme Court of Ohio

Date: June 16, 2023

The complaint for disqualification in this case was filed by an attorney who attempted to make an appearance in a guardianship case on behalf of a ward, indicating only that the attorney was hired by a third-party. The probate court held that the attorney failed to show an attorney-client relationship with the ward.

The relevant statute, R.C. 2101.39, is as follows:

If a probate judge allegedly has a bias or prejudice for or against a party or a party's counsel in a proceeding pending before the judge, allegedly otherwise is interested in a proceeding pending before the judge, or allegedly is disqualified to preside in the proceeding [,] * * * any party to the proceeding or the party's counsel may file an affidavit of disqualification with the clerk of the supreme court.

The Supreme Court interpreted this section broadly, holding that an attorney representing a party in any capacity has standing to file an affidavit of disqualification even if the attorney is not representing the party in the immediate proceeding before the judge. As an officer of the court, the attorney's statements that she represented the party were sufficient to establish that she was the party's attorney.

As to the merits of the affidavit of disqualification, the Court held that disagreements with the substantive or procedural matters of the case are not in themselves evidence of bias and the normal appellate procedure must be followed. Additionally, affidavits of disqualification are not the appropriate vehicle to address allegations of violations of the Code of Judicial Conduct.

Jurisdiction

Issue: Administrative Appeals

TITLE: Johnson v. Ohio Department of Job & Family Services; 2023-Ohio-4629

COURT: 9th Appellate District, Summit County

DATE: December 20, 2023

Department of Mental Health & Addiction Services initiated a resident review and denied nursing services. Resident appealed hearing officer's decision and ODJFS decision to Probate Court. Case transferred to General Division which denied motion to transfer back. Resident appealed. Trial Court did not err by denying transfer to probate court as plain language of R.C. 5301.35(E) shows that the general division has jurisdiction over administrative appeals.

TOPIC: Administrative Appeals

TITLE: Morris v. Ohio Department of Job & Family Services; 2023-Ohio-4826

COURT: 9th Appellate District, Summit County

DATE: December 29, 2023

Resident requested review of a pre admission screening and resident review in which he was denied nursing facility services. Appealed determination to ODJFS which affirmed state hearing decision. Resident then appealed to Probate Court which transferred case to the general division. Resident moved to transfer back. Trial Court denied motion.

Held: Probate Court does not have exclusive jurisdiction over administrative appeal. Resident did not meet his burden on appeal to demonstrate that the Ohio Department of Mental Health and Addiction Services was prohibited from conducting a resident review based upon DODD's determination that he was not subject to further review by DODD. Affirmed.

Trusts

Guardianship

Involuntary Commitment

Disinterments

Name Change/Birth Record Corrections

Disqualification

Jurisdiction