OHIO STATE BAR ASSOCIATION
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Council of Delegates Meeting

July 24, 2020
Ohio State Bar Association Headquarters
Columbus

Council of Delegates Meeting

Friday, July 24, 2020
10:30 AM
Or immediately following General Assembly Meeting

President Eleana A. Drakatos presiding

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COUNCIL OF DELEGATES MEETING AGENDA
Friday, July 24, 2020
10:30 a.m. (or immediately following General Assembly Meeting)

President Eleana A. Drakatos presiding

I. Roll Call of the Council, CEO and Corporate Secretary Mary Amos Augsburger

II. Committee and Section Reports

A. Report of the Agricultural Law Committee

To adopt a crop lease termination statute that generally requires notice of termination of a lease be given before September 1 of the previous crop year if the lease is silent on termination requirements.

B. Report of the Criminal Justice Committee and the Young Lawyers Section Council

To authorize the OSBA to advocate for the creation of a nonpartisan agency to assist the legislature with understanding the implications of legislation that creates, suspends, or amends criminal prohibitions by providing the General Assembly and the public with an advanced empirical analysis of bills affecting criminal justice.

C. Report of the Estate Planning, Trust and Probate Law Section Council

1. A proposal to amend R.C. § 2117.06 to clarify the process by which a creditor shall present a claim against an estate and specifically allow for presentation of a claim by a filing with the probate court, and to make conforming changes to R.C. § 2117.07.

2. A proposal to amend R.C. § 2107.03 to clarify the term "writing" for purposes of creating a will.

3. A proposal to amend R.C. §§ 517.23, 517.24, 517.25, and 2108.82 to be consistent with and coordinated with the Ohio right of disposition statutes (R.C. §§ 2108.70 to 2108.90).

4. A proposal to enact a new section of the Ohio Trust Code, establishing an optional process for resolving claims on conclusion of a trustee's administration of an Ohio irrevocable inter vivos trust.

5. A proposal to amend R.C. §§ 3013.05, 3013.06, 3105.171(A)(6)(a)(v) and 2106.22 in order to allow for spouses to voluntarily enter into a postnuptial agreement and to voluntarily modify or terminate an antenuptial or postnuptial agreement.

6. A proposal to amend R.C. § 2131.09 to clarify the effective date of certain provisions in the existing statute.

7. A proposal to enact new R.C. § 2131.14 to allow transfer on death beneficiary designations for tangible personal property.

D. Report of the Family Law Committee

To amend R.C. § 3109.04 to restore the legal term “unsuitability” to ensure that the state cannot wrongfully remove a child from a suitable parent.

E. Report of the Juvenile Law Committee

To recommend and seek implementation of the substance of the rule change, including addressing the practical problems of implementation—lack of funding and availability of qualified counsel to take juvenile cases.

F. Report of the Military and Veterans' Affairs Committee

To request that the Chief Justice of the Supreme Court of Ohio start collecting data regarding Ohio attorneys who are serving or who have served in the Armed Forces, National Guard, and Reserves (collectively, active duty or veterans), which will require an amendment to Section 4 of Rule VI, "Registration of attorneys" of the Supreme Court Rules for the Government of the Bar of Ohio.

G. Report of the Negligence Law Committee

To amend section 2125.02 to establish a requirement that "other next of kin" shall present a claim of damages and to eliminate the notice requirement of Sup. R.70 (B) to such "other next of kin" who fail to do so.

H. Report of the Real Property Law Section Council

1. To amend R.C. 2329.02 for the purposes of addressing a common problem in Ohio involving identifying judgment debtors to minimize problems associated with common names, in particular.

2. To modify the Ohio Standards of Title Examination by amending Standards 1.1, 2.3, 3.1, 4.9, 5.4, 8.1, 9.3, 9.5, 10.1, 10.2, and 10.3; to eliminate Standard 5.2, but keep its number as a “placeholder;” to add new Standards 7.3, 11.1, 11.2, 11.3, and 11.4, revise the index, and edit for correction and uniformity. These changes attempt to provide further clarification as to the interchangeable use of the term “marketable record title” and “record marketable title;” revise the proposed form of an attorney certificate or opinion on title primarily to reflect that records of the United States Bankruptcy Court and the United States District Court are only reflected in such certificate or opinion if the real property

is located in a county in which such courts are also located; to eliminate a Standard which appeared to have little application; to clarify requirements regarding notice with respect to a summary land sale proceeding; to add a Standard to reflect that proceedings that are not yet final may affect title to real property; to address the concept of "Root of Title" within the Marketable Title Act; to update a reference to the appropriate section of an Ohio Rule of Civil Procedure following amendment; to reflect a change in a civil rule which previously permitted out-of-state service to be completed by the filing of an affidavit of due diligence; to update references to subsections of the Ohio Revised Code in sections applicable to condominiums; to incorporate additional statutory language with respect to condominium drawings; and to make a Standard general neutral. Additionally, new Standards 11.1, 11.2, 11.3, and 11.4 are proposed to address when bankruptcy proceedings may affect title to real property. Finally, a revised index is proposed to address the addition of new Standards; the changes of name of two existing Standards; and to harmonize punctuation; and a final edit of the Standards is proposed to correct typographical errors; to provide for uniform formatting of effective dates and amendment dates of the Standards; and to harmonize references to routinely-mentioned things such as the Ohio Revised Code, the Ohio Marketable Title Act, and "real estate" and "real property."

III. Adjournment

Awards will also be presented throughout the day for the Ohio Bar Medal, the Nettie Cronise Lutes Award, the Eugene R. Weir Award and the Ohio Access to Justice Foundation Presidential Award

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Ohio State Bar Association
2019 - 2020 Council of Delegates
Eleana A. Drakatos, President

District 1

Counties: Butler, Clermont, Clinton, Hamilton and Warren

Board of Governors Representative:

David H. Lefton, 3074 Madison Road,
Cincinnati, OH 45209-1723 06/30/20

Council of Delegates (19):

Edward P. Brueggeman, 312 Kings Mills Road,
Mason, OH 45040-1853 06/30/20

Eric K. Combs, 255 E. 5th Street, Ste. 1900,
Cincinnati, OH 45202-1971 06/30/20

Kendra L. Daugherty, 4529 Aicholtz Road,
Cincinnati, OH 45245-1001 06/30/20

Stephanie M. Day, 600 Vine Street, Ste. 2700,
Cincinnati, OH 45202-2409 06/30/20

Timothy A. Garry, Jr., 4645 Montgomery Road, Ste. 203,
Norwood, OH 45212 06/30/20

John D. Holschuh, Jr., 600 Vine Street, Ste. 2700,
Cincinnati, OH 45202-2409 06/30/20

Doloris F. Learmonth, 3498 Forest Oak Court,
Cincinnati, OH 45208-1842 06/30/20

Theresa L. Nelson, 150 E. 4th Street,
Cincinnati, OH 45202-4018 06/30/20

Zachary D, Prendergast, 250 E. 5th Street, Ste. 310,
Cincinnati, OH 45202-4150 06/30/20

James C. Shew, 16 N. Main Street,
Middletown, OH 45042-1905 06/30/20

Terrence M. Donnellon, 9079 Montgomery Road,
Cincinnati, OH 45242-7711 06/30/21

Richard I. Fleischer, 810 Sycamore Street, 2nd Floor,
Cincinnati, OH 45202 06/30/21

Gregory S. French, 1244 Padlock Hills Avenue,
Cincinnati, OH 45229-1218 06/30/21

Michael L. Gay, 201 E. Fifth Street, Ste. 900,
Cincinnati, OH 45202 06/30/21

Barbara J. Howard, 120 E. Fourth Street, Ste. 960,
Cincinnati, OH 45202-4096 06/30/21

Stephen C. Lane, 7419 Kingsgate Way, Ste. A,
West Chester, OH 45069-6517 06/30/21

Lauren E. Raizk, 145 N. South Street,
Wilmington, OH 45177-1646 06/30/21

Charles E. Strain, 4030 Mt. Carmel-Tobasco Road #103,
Cincinnati, OH 45255-3454 06/30/21

John J. Williams, 600 Vine Street, Ste. 1400,
Cincinnati, OH 45202-2474 06/30/21

District 2

Counties: Darke, Miami, Montgomery, Preble and Shelby

Board of Governors Representative:

Magistrate Kathleen S. Lenski, 380 W. 2nd Street,
Dayton, OH 45422-4240 06/30/21

Council of Delegates (7):

Magistrate Gary J. Carter, P. O. Box 947,
Sidney, OH 45365-0947 06/30/20

Jared B. Chamberlain, 215 W. Water Street,
Troy, OH 45373 06/30/21

Elizabeth J. Orlando, 444 W. Third Street, Suite 6141
Dayton, OH 45402 06/30/21

Judge Jenifer K. Overmyer, 101 E. Main Street,
2nd Floor, Eaton, OH 45320-1758 06/30/21

Matthew J. Pierron, 507 S. Broadway,
Greenville, OH 45331-1975 06/30/21

Michael W. Sandner, 75 Trevor Lane,
Springboro, OH 45066-8306 06/30/21

Katrina L. Wahl, 40 N. Main Street, Suite 2700,
Dayton, OH 45423-2700 06/30/21

District 3

Counties: Defiance, Fulton, Hancock, Henry, Paulding, Putnam, Van Wert, Williams and Wood

Board of Governors Representative:

Judge Denise H. McColley, 660 N. Perry Street, Suite 401
Napoleon, OH 43545 06/30/22

Council of Delegates (3):

Harvey D. Hyman, 123 N. Main Street,
Paulding, OH 45879-1237 06/30/20

Lee R. Schroeder, 100 S. High Street, Suite A,
Columbus Grove, OH 45830-1241 06/30/20

Shaun Putman, 111 E, Main Street, Suite 105
Van Wert, OH 45891 06/30/21

District 4

Counties: Lucas, Ottawa and Sandusky

Board of Governors Representative:

Michelle L. Kranz, 6627 W. Central Avenue, Ste. 100,
Toledo, OH 43617-1017 06/30/20

Council of Delegates (7):

Joseph K. Cole, 300 Madison Avenue, Ste. 1000 Toledo, OH 43604-1550	06/30/20
Shelly R. Kennedy, 725 W. Broadway Street, Maumee, OH 43537-1902	06/30/20
Linde H. Webb, 2630 Edgehill Road, Ottawa Hills, OH 43615	06/30/20
Vallie T. Bowman-English, 555 N. Erie Street, Toledo, OH 43604-1391	06/30/21
Mary Elizabeth Fiser, P. O. Box 372, Clyde, OH 43410	06/30/21
Kevin M. Peters, 132 Madison Street, Port Clinton, OH 43452-1195	06/30/21
Sarah K. Skow, 900 Adams Street, Toledo, OH 43604-5505	06/30/21

District 5

Counties: Crawford, Delaware, Marion, Morrow, Seneca and Wyandot

Board of Governors Representative:

Victor H. Perez, P. O. Box 101, Tiffin, OH 44883-0101	06/30/20

Council of Delegates (3):

Sean A. Martin, 102 E. Findlay Street, Carey, OH 43316-1248	06/30/20
Robert J. Rice, 140 N. Sandusky Street, Delaware, OH 43015-1733	06/30/20
Ronald D. Cramer, 116 S. Main Street, Marion, OH 43302-3702	06/30/21

District 6

Counties: Champaign, Clark, Fayette, Greene, Logan, Madison and Union

Board of Governors Representative:

Gregory R. Flax, 500 N. Fountain Avenue,
Urbana, OH 43078 — 06/30/22

William R. Groves, 900 Dayton Street,
Yellow Springs, OH 45387 — 06/30/20

Council of Delegates (3):

William C. Hicks, P. O. Box 1687,
Springfield, OH 45501-1687 — 06/30/20

Amanda J. Lantz, 333 N. Limestone Street, Ste. 202A,
Springfield, OH 45503 — 06/30/21

Douglas M. Smith, 112 N. Main Street,
Bellefontaine, OH 43311-2089 — 06/30/21

District 7

Counties: Franklin

Board of Governors Representative:

David S. Bloomfield, Jr., 41 S. High Street, Ste. 3100,
Columbus, OH 43215-6101 — 06/30/20

Caitlin E. Anderson, 700 Cardinal Place,
Dublin, OH 43017 — 06/30/22

Council of Delegates (27):

Belinda S. Barnes, 471 E. Broad Street, 19th Floor,
Columbus, OH 43215-3872 — 06/30/20

Sally W. Bloomfield, 100 S. Third Street,
Columbus, OH 43215-4291 — 06/30/20

Alphonse P. Cincione, 556 E. Town Street, Ste. 100,
Columbus, OH 43215 — 06/30/20

Paul Giorgianni, 1538 Arlington Avenue, Columbus, OH 43212-2710	06/30/20
Eric W. Johnson, 400 S. Fifth Street, Ste. 101, Columbus, OH 43215-5430	06/30/20
Helen Mac Murray, 6530 West Campus Oval, Ste. 210, New Albany, OH 43054	06/30/20
Jane Higgins Marx, 366 E. Broad Street, Columbus, OH 43215-3876	06/30/20
Heather G. Sowald, 400 S. Fifth Street, Ste. 101, Columbus, OH 43215-5430	06/30/20
Magistrate Elizabeth J. Watters, 345 S. High Street, Room 5807, Columbus, OH 43215-4516	06/30/20
Bradley B. Wrightsel, 3300 Riverside Drive, Ste. 100, Columbus, OH 43221-1726	06/30/20
David C. Barrett, 7259 Sawmill Road, Ste. 150, Dublin, OH 43016	06/30/21
Thomas J. Bonasera, 191 W. Nationwide Boulevard, Ste. 300, Columbus, OH 43215-2569	06/30/21
David A. Bressman, 5186 Paul G. Blazer Parkway, Dublin, OH 43017	06/30/21
Stephen E. Chappelear, 10 W. Broad Street, Ste. 2300, Columbus, OH 43215-3467	06/30/21
Christopher T. Curry, 7179 Hollandia Drive, Westerville, OH 43081-9380	06/30/21
Hilary R. Damaser, 30 E. Broad Street, 26th Floor, Columbus, OH 43215	06/30/21
Polly J. Harris, 41 South High Street, Suite 2900, Columbus, OH 43215	06/30/21
Caitlyn Nestleroth Johnson, 30 E. Broad Street, 17th Floor, Columbus, OH 43215	06/30/21

Donald B. Leach, Jr., 191 W. Nationwide Boulevard,
Ste. 300, Columbus, OH 43215-2569 06/30/21

Judge Stephen L. McIntosh, 345 S. High Street, Courtroom
4B, Columbus, OH 43215-4516 06/30/21

Elizabeth Mote, 445 Hutchinson Avenue, Suite 100,
Columbus, OH 43235-8630 06/30/21

Scott R. Mote, 1650 Lake Shore Drive, Ste. 375,
Columbus, OH 43204-4991 06/30/21

Andrew W. Owen, 65 East State Street, Suite 1100,
Columbus, OH 43215-4213 06/30/21

Beatrice K. Sowald, 125 Eastmoor Boulevard,
Columbus, OH 43209-2017 06/30/21

E. Jane Taylor, 318 E. Beck Street,
Columbus, OH 43206-1278 06/30/21

Audrey E. Varwig, 2020 Concord Road,
Upper Arlington, OH 43212-1948 06/30/21

Thomas W. Weeks, 126 S. Stanwood Road,
Bexley, OH 43209-1859 06/30/21

District 8

Counties: **Adams, Brown, Gallia, Highland, Jackson, Lawrence, Pickaway, Pike, Ross, Scioto and Vinton**

Board of Governors Representative:

Frederick C. Fisher, Jr., 311 Park Avenue,
Ironton, OH 45638-1525 06/30/21

Council of Delegates (2):

Richard W. Clagg, 16 E. Broadway,
Wellston, OH 45692 06/30/20

George L. Davis, III, 602 Chillicothe Street, Ste. 802,
Portsmouth, OH 45662 06/30/21

District 9

Counties: Coshocton, Fairfield, Knox, Licking, Muskingum and Perry

Board of Governors Representative:

Janice A. Baughman, 111 N. 4th Street,
Zanesville, OH 43701 06/30/22

Council of Delegates (3):

Wendi Fowler, 2171 Eagle Pass,
Wooster, OH 44691 06/30/20

Jason Given, 318 Chestnut Street,
Coshocton, OH 43812-2019 06/30/21

Scott Wood, 120½ E. Main Street,
Lancaster, OH 43130-3712 06/30/21

District 10

Counties: Ashland, Erie, Holmes, Lorain, Medina, Richland, Huron and Wayne

Board of Governors Representative:

Andrew P. Lycans, P. O. Box 599,
Wooster, OH 44691-0599 06/30/20

Council of Delegates (6):

Gowri V. Hampole, 124 Middle Avenue, 4th Floor,
Elyria, OH 44035 06/30/20

Robert J. Reynolds, P. O. Box 958,
Wooster, OH 44691-0958 06/30/20

Patricia A. Walker, 231 S. Broadway,
Medina, OH 44256-2601 06/30/20

Christopher Lake Brown, 30 N. Diamond Street,
Mansfield, OH 44902 06/30/21

Kevin W. Donovan, 726 Sunrise Drive,
Amherst, OH 44001 06/30/21

Richard R. Mellott, Jr., 5750 Cooper Foster Park Road,
Ste. 102, Lorain, OH 44053-4132 06/30/21

District 11

Counties: Portage and Summit

Board of Governors Representative:

Lawrence J. Scanlon, 57 S. Broadway Street, 3rd Floor,
Akron, OH 44308 06/30/21

Council of Delegates (8):

Montrella S. Jackson, 217 S. High Street, Ste. 713,
Akron, OH 44308-1689 06/30/20

Ronald S. Kopp, 222 S. Main Street, Ste. 400,
Akron, OH 44308-1500 06/30/20

Magistrate Diana J. Prehn, 10208 Spinnaker Run,
Reminderville, OH 44202 06/30/20

Maura E. Scanlon, 4040 Embassy Parkway, Ste. 240,
Akron, OH 44333-8354 06/30/20

Terri E. Brunsdon, 2251 Front Street. Ste. 206
Cuyahoga Falls, OH 44221 06/30/21

Melissa A. Graham-Hurd, 333 S. Main Street, Ste. 301,
Akron, OH 44308-1225 06/30/21

Carmen V. Roberto, 23 South Main Street, 3rd Floor,
Akron, OH 44308 06/30/21

Bruce H. Wilson, 120 E. Mill Street, Ste. 416,
Akron, OH 44308 06/30/21

District 12

(Lost 2 member per certification for 2019-2020)

Counties: Cuyahoga

Board of Governors Representative:

Michael J. Frantz, Jr., 200 Public Square, Ste. 3000,

Cleveland, OH 44114-2316	06/30/22

Council of Delegates (26):

Klevis Bakiaj, 200 Public Square, Ste. 3000, Cleveland, OH 44114-2316	06/30/20
Ian N. Friedman, 1360 E. 9th St., Suite 650, Cleveland, OH 44114-1723	06/30/20
Thomas G. Haren, 200 Public Square, Ste. 3000, Cleveland, OH 44114	06/30/20
Christopher G. Hawley, 600 Superior Ave. E., Suite 2100, Cleveland, OH 44114-2653	06/30/20
Jared P. Hasson, 19337 Frazier Drive, Rocky River, OH 44116-1724	06/30/20
Christa A.G. Heckman, 950 Main Avenue, 4th Floor, Cleveland, OH 44113-7201	06/30/20
Erin McDevitt-Frantz, 812 Huron Rd, Suite 650, Cleveland, OH 44115-1126	06/30/20
Lisa A. Reid, 615 W. Superior Avenue, 11th Floor, Cleveland, OH 44113-1899	06/30/20
Karen E. Rubin, 127 Public Square, Ste. 3900, Cleveland, OH 44114-1291	06/30/20
Jonathan M. Scandling, 200 Public Square, Suite 3000 Cleveland, OH 44114-1705	06/30/20
Ryan T. Smith, 200 Public Square, Ste. 3000 Cleveland, OH 44114-2316	06/30/20
John P. Thomas, 301 Hamilton Drive, Broadview Heights, OH 44147	06/30/20
Barbara Friedman Yaksic, 8325 Browning Court, Mentor, OH 44060-8079	06/30/20
Keith A. Ashmus, 200 Public Square, Ste. 3000, Cleveland, OH 44114-2316	06/30/21

Eileen M. Bitterman, 323 W. Lakeside Avenue, Ste. 200,
Cleveland, OH 44113-1099 06/30/21

Jeffrey A. Brauer, 200 Public Square, Ste. 2800,
Cleveland, OH 44114-2303 06/30/21

Luke T. Brewer, 623 W. St. Clair Avenue,
Cleveland, OH 44113 06/30/21

Michael C. Brink, 950 Main Avenue, Ste. 1100,
Cleveland, OH 44113-7213 06/30/21

Alicia N. Graves, 26110 Emery Road, Ste. 250,
Cleveland, OH 44128 06/30/21

Fredric E. Kramer, 1187 Golden Gate Road,
Mayfield Heights, OH 44124 06/30/21

John P.L. Mills, 1301 E. 9th Street,
Cleveland, OH 44114 06/30/21

Marlon A. Primes, 801 W. Superior Avenue, Ste. 400,
Cleveland, OH 44113-1852 06/30/21

Renuka Raman, 28852 Woodmill Drive,
Westlake, OH 44145 06/30/21

Daniel J. Ryan, 55 Public Square, Ste. 2100,
Cleveland, OH 44113-1967 06/30/21

Nancy C. Schuster, 2913 Clinton Avenue,
Cleveland, OH 44113-2940 06/30/21

Dane A. Shrallow, 32680 Shadowbrook Drive,
Solon, OH 44139 06/31/21

District 13

Counties: Columbiana and Mahoning

Board of Governors Representative:

Don W. Humphrey, Jr., 38832 Saltwell Road,
Lisbon, OH 44432 06/30/20

Council of Delegates (3):

Mark A. Hutson, 33 Pittsburgh Street,
Columbiana, OH 44408-1309 06/30/20

J. Michael Thompson, 6 Federal Plaza Central, Ste. 1300,
Youngstown, OH 44503-1508 06/30/20

Ronald E. Slipski, 527 Greenmont Drive,
Canfield, OH 44406-9660 06/30/21

District 14

Counties: Carroll, Stark and Tuscarawas

Board of Governors Representative:

Daniel R. Griffith, 211Woodrow Street, NW,
Canton, OH 44720-1935 06/30/21

Kathleen A. Stoneman, 63 2nd Street, SW,
Carrollton, OH 44615 06/30/21

Council of Delegates (4):

Jennifer Thomas, P. O. Box 235,
Carrollton, OH 44615 06/30/20

Howard L. Wernow, 4940 Munson Street NW,
Ste 1100, Canton, OH 44718-3615 06/30/20

Thomas P. Moushey, 1844 W. State Street, Ste. A,
Alliance, OH 44601-3539 06/30/21

D. Stephen Stone, Jr., 981 W. State Street,
Alliance, OH 44601-4696 06/30/21

District 15

Counties: Belmont, Guernsey, Harrison, Jefferson and Monroe

Board of Governors Representative:

Bryan C. Conaway, 126 N. 9th Street,
Cambridge, OH 43725-2334 06/30/21

Council of Delegate (1):

C. Keith Plummer, P. O. Box 640,
Cambridge, OH 43725-0640 06/30/21

District 16

Counties: Allen, Auglaize, Hardin and Mercer

Board of Governors Representative:

Amy B. Ikerd, 119 N. Walnut Street,
Celina, OH 45822-1657 06/30/21

Council of Delegates (1):

Courtney W. Burton, P. O. Box 299,
Wapakoneta, OH 45895-0299 06/30/20

District 17

Counties: Athens, Hocking, Meigs, Morgan, Noble and Washington

Board of Governors Representative:

Scott M. Robe, 14 W. Washington Street,
Athens, OH 45701-2432 06/30/22

Council of Delegates (1):

James K. Stanley, 117 W. 2nd Street,
Pomeroy, OH 45769 06/30/21

District 18

Counties: Ashtabula, Geauga, Lake and Trumbull

Board of Governors Representative:

Dennis M. Coyne, 1428 Hamilton Avenue,
Cleveland, OH 44114-1106 06/30/22

Council of Delegates (4):

Samuel R. Martillotta, 11715 Riverwood Drive
Chardon, OH 44024 06/30/20

Matthew G. Vansuch, 6550 Seville Drive, Ste. B,
Canfield, OH 44406 06/30/20

Michael E. Hamper, III, 531 East Beech Street
Jefferson, OH 44047 06/30/21

Anna M. Parise, 60 S. Park Place,
Painesville, OH 44077-3417 06/30/21

At-Large Delegates

Martin E. Mohler, 405 Madison Avenue, Ste. 1000,
Toledo, OH 43604-1276 06/30/20

Christina M. Spencer, 6494 Centerville Business Parkway,
Dayton, OH 45459-2633 06/30/20

John S. Stith, 250 E. 5th Street, Ste. 2200,
Cincinnati, OH 45202-5118 06/30/20

Magistrate Joseph S. Gallagher, 41 N. Perry Street,
Dayton, OH 45402-1431 06/30/21

Carol Seubert Marx, 106 Starrit Street, Ste. 210,
Lancaster, OH 43130-3993 06/30/21

Rachel A. Sabo, 6612 Dalmore Lane,
Dublin, OH 43016-6018 06/30/21

Parliamentarian

Robert A. Brundrett, 33 N. High Street, 6th Floor
Columbus, OH 43215 06/30/20

At-Large Board of Governors Appointees

William R. Groves, 900 Dayton Street,
Yellow Springs, OH 45387 06/30/20

Kathleen A. Stoneman, 63 2nd Street, SW,
Carrollton, OH 44615 06/30/21

Caitlin E. Anderson, 700 Cardinal Place,
Dublin, OH 43017 06/30/22

OSBA Elected Officers and Past Officers

Eleana A. Drakatos, President, 1243 S. High Street,
Columbus, OH 43206-3445 06/30/20

Judge Linda Teodosio, President-elect, 650 Dan Street,
Akron, OH 44310-1256 06/30/20

Robin G. Weaver, Immediate Past President,
27 Lyman Circle, Cleveland, OH 44114-1284 06/30/20

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OHIO STATE BAR ASSOCIATION

BYLAWS OF THE COUNCIL OF DELEGATES

Section I

In the absence or disability of both the president and president-elect of the Association, the meetings of this Council shall be presided over by a chairperson pro tempore, elected by a majority vote of the Council members present, which chairperson, when elected, shall serve in that capacity only during the sessions of the meeting at which he or she is elected. The secretary shall convene the first session of any meeting from or at which both the president and president-elect are absent or unable to preside and preside during the election of such chairperson pro tempore.

Section II

No action shall be taken upon reports of committees or sections of the Association unless they are submitted in writing; and no such committee or section report, which has been published in the *Ohio State Bar Association Report* or other publication of the Association that is distributed to all regular members, as directed by the Board of Governors, prior to the date of the meeting of the Council, shall be read orally to the meeting unless, by motion adopted by two-thirds vote of the delegates present, such a reading be ordered.

Section III

No person shall, without the consent of two-thirds of the delegates present, be entitled to speak more than once or for more than five minutes on any issue before the Council. Reports presented by committees and sections shall be limited to ten minutes, provided, however, that the ten-minute restriction shall not apply to the discussion of a proposal subsequent to its initial presentation. A member of the council or person presenting a report or resolution shall be entitled to open and close the discussion on the matter under consideration.

Section IV

Voting on all matters shall be by voice vote unless the presiding officer is in doubt concerning the result, or a division of the house is requested by any member, in either of which events a standing vote shall be taken.

Section V

The president of the Association shall, with the advice and consent of the Board of Governors, appoint a parliamentarian to aid and assist him or her or the chairperson at all meetings of the Council of Delegates. Said parliamentarian, whose term of office shall be concurrent with that of the president, shall not be a member of the current Board of Governors or the Council of Delegates.

Section VI

The order of business of all meetings of the Council of Delegates shall be the following:

i. Roll call.
ii. Action of minutes of previous meetings.
iii. Unfinished business from preceding day, if any.
iv. Special order of business for the day, as previously prepared by the president, president-elect and secretary of the Association.
v. New business.

Section VII

Roberts' Rules of Order shall govern the Council of Delegates in all its proceedings, except to the extent to which these bylaws are, or the constitution of the Association is, inconsistent therewith.

Section VIII

These bylaws may be amended by the majority vote of the delegates present at any meetings, provided the proposed amendment has been published in the *Ohio State Bar Association Report* or other publication of the Association that is distributed to all regular members as directed by the Board of Governors at least once, not less than one week prior to the date of the meeting at which action on said amendment is taken.

As amended by the Council of Delegates November 7, 2003

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REPORT OF THE AGRICULTURAL LAW COMMITTEE

To the Council of Delegates

The Agricultural Law Committee requests your favorable consideration of the following proposal:

> To adopt a crop lease termination statute that generally requires notice of termination of a lease be given before September 1 of the previous crop year if the lease is silent on termination requirements.

Respectfully submitted,

Leah F. Curtis, *Columbus*
Chair, Agricultural Law Committee

Summary and Rationale for Proposal

In June 2019, the Ohio State Bar Association's ("OSBA") Agriculture Law Committee ("Committee") formed an ad hoc legislative subcommittee ("Subcommittee"). The Committee tasked the Subcommittee with examining the question of whether Ohio needs a statutory protection for farmers who have their lease terminated shortly before planting season. The Committee concluded that Ohio should adopt a crop lease termination statute that generally requires notice of termination of a lease be given before September 1 of the previous crop year if the lease is silent on termination requirements.

An inspection of the statutory crop lease termination policies across many midwestern states reveals that Ohio is behind the times. Due to the costly impact and extreme interference that can be caused by a sudden lease termination, states have elected to protect their citizens through legislative fixes. Ohio farmers are in need of the same type of protections to allow for better crop planning, more efficient allocation of resources, and for the expeditious resolution of any lease disputes.

A. Issue Presented

Francis Farmer has been leasing a 100-acre field from Louis Landlord on a verbal lease for ten years. At the end of 2019, after harvesting his corn crop, Francis completed some tillage to decompact the soil, applied some nutrients to the field to assist with soil health, and purchased all of the seed and herbicide she would need to farm the field in 2020. In March of 2020, one month before Francis planned to plant soybeans in the field, Louis told Francis she would not farm the field that year. Louis cited a better rent offer from a competing farmer as the grounds for terminating the lease.

Does Louis have the absolute right to evict Francis with one month's notice? What about Ohio common law that states a farm lease is a year-to-year relationship that terminates on December 31 unless otherwise extended? What happens if Francis disregards the notice and farms the

ground anyways? Does the doctrine of partial performance dictate that a contract existed due to Francis's preparatory efforts for the 2020 crop? Or does the Statute of Frauds provide an absolute defense for Louis? If Francis cannot farm the field, is she entitled to recovery for improving the ground through decompaction and nutrient application?

Sadly, this fact particular fact pattern and other similar fact patterns occur all too often across Ohio. Inevitably lawyers must get involved and the parties ask questions similar to the ones in the previous paragraph. Ultimately, this fact pattern can result in fiscal harm to the farmer, deterioration of a working relationship between landowner and tenant, and in some cases, a legal dispute between the sides. A number of factors contribute to this issue and merit brief examination.

B. Frequency of Verbal Leases

The issue begins with the nature of the agreement between the parties. Information from private legal practitioners and The Ohio State University Cooperative Extension service suggest that a majority of farm leases in Ohio are verbal agreements. This practice differs substantially from other commercial leases or residential leases, which are almost always in writing. Farm leases have lagged behind in this area, which poses a problem when coupled with Ohio's Statute of Frauds. Although a persuasive argument, the Statute of Frauds is not a standalone winning argument.

C. Common Agronomic Farming Practices

The absence of a written farm lease between parties can pose one problem, but the common agronomic practices of Ohio farmers present a host of other issues in this area:

1. Preparation for planting may begin in the fall

If you recall in our hypothetical, Francis harvested her 2019 corn crop in the fall and immediately began tilling the soil and applying nutrients in preparation for the 2020 crop. These are common agronomic practices employed by many farmers. Other producers may sew cover crops in the fall to prevent erosion, alleviate nutrient loss, or improve soil conditions. Although rarer in Ohio, a few producers plant winter wheat on a field post-harvest with the intent of harvesting the crop the following summer.

All of these activities involve upfront investment by the farmer with the expectation that she will have access to the same field the following crop season. If the proverbial rug is pulled out from under the farmer, thousands of dollars could be washed away after improving the field and the landlord's property would be enriched as a result of the farmer's expenditures.

2. Prepayment of inputs

Francis exhibited another common practice among producers. At the end of 2019, she paid for her seed and fertilizer needs for the 2020 crop. Farmers regularly employ this end-of-year tactic. Typically seed, fertilizer, or herbicide companies will offer incentives for farmers to

purchase their inputs prior to the end of the year. By taking advantage of these offers, farmers can save thousands of dollars in input costs. Farmers also use prepayment as a end-of-year deductible expense for their taxes.

The key part of prepaying for inputs is knowing the acreage that a farmer is going to farm the next year. If Francis believes she is farming 1,000 acres in 2020, but actually ends up farming 900 acres, the surplus inputs resulting from 100 un-farmed acres can represent thousands of dollars of waste. In some instances, she may be able to resell inputs at a discount and the cost of delivery. In others, particularly with special seed orders, she will be unable to return or resell the order and will be forced to eat that cost.

3. Crop insurance and federal commodity programs

Farmer participation in crop insurance programs and federal commodity programs are also commonplace. Applications, enrollment, certification, and reporting deadlines occur throughout the calendar year. An impromptu lease termination may harm a farmer's eligibility for benefits, adverse impact on a farmer's production numbers (a key factor in crop insurance assessments) or result in lost insurance premium payments.

4. Grain futures contracts

Finally, in some instances a farmer can contract for the sale of grain from a field before the field is planted. During the winter months, if a farmer can reasonably project her yields from a particular farm, she may enter into a grain futures contract with a commodity purchaser to lock in favorable pricing or capitalize on available premiums. In order to receive the agreed-upon contract price, the farmer must make delivery of the commodity in accordance with the contract terms.

Back to our example, pretend that Francis executed a grain futures contract for the delivery of a certain volume of soybeans in the fall of 2020. That delivery amount took into account soybeans that were supposed to come from Louis's field. Now that Louis has terminated the lease, Francis may be unable to make delivery of the necessary soybean volume in order to fulfill the futures contract terms. This contractual breach may result in lost profits or financial penalties for Francis.

D. Proposal

The Subcommittee offers the following policy plan to address the issues facing Ohio farmers and landowners:

1. Existing State Law

Several midwestern states, including Indiana, Illinois, Iowa, Minnesota, and Wisconsin, have enacted policy addressing statutory lease termination. Indiana, Illinois, Minnesota, and Wisconsin demand that a landowner terminate a lease between 60 and 120 days prior to the end of the lease. Iowa, on the other hand, mandates that landowners terminate a lease before

September 1 of a current crop year. Written notice from a terminating party is a consistent piece of each state's law.

2. Applicability and Scope

This proposal is limited to the dates and notice requirements for applicable leases. The proposal would not address any other lease issues that would arise between landowner and tenant farmer. Any proposed legislation would apply strictly to crop leases on vacant tillable ground in Ohio. This includes both cash leases, which involve a per acre rental fee, and crop share leases, which involve the landlord and farm tenant sharing in the expenses and income of a crop. Pasture leases, timber leases, and farm or horticultural building leases would not be subject to any new law.

Text of Proposal

(A) As used in this section:

(1) "Agricultural lease agreement" means an agreement or lease, written or oral, that establishes or modifies the terms, conditions, rules, or any other provisions between a landlord and tenant concerning the use and occupancy of real property for the purposes of and upon which crops are planted, grown, and harvested and all applicable practices necessary for such purposes.

(2) "Landlord" means the owner or lessor of real property used for agricultural purposes that is authorized to receive remuneration from a tenant under an agricultural lease.

(3) "Tenant" means the person entitled under an agricultural lease to use the real property for agricultural purposes to the exclusion of all others.

(B)(1) Notwithstanding the provisions of Chapter 1335 of the Revised Code, where an agricultural lease agreement does not provide for a termination date or method for notice of termination of the agricultural lease agreement, the notice of termination by the landlord shall be provided to the tenant by writing, facsimile, or electronic mail on or before the first of September.

(2) If notice of termination of the agricultural lease agreement is given according to the provisions of this section, the termination date for the agricultural lease agreement shall be effective as of the thirty-first of December of the year in which notice is given, unless otherwise agreed to by the landlord and tenant.

(C) This section does not apply to leases for pasture, timber, farm buildings, horticultural buildings, or leases soley for equipment.

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REPORT OF THE CRIMINAL JUSTICE COMMITTEE AND THE YOUNG LAWYERS SECTION COUNCIL

To the Council of Delegates

The Criminal Justice Committee and the Young Lawyer Section Council respectfully requests your favorable consideration of the following proposal:

> To authorize the OSBA to advocate for the creation of a nonpartisan agency to assist the legislature with understanding the implications of legislation that creates, suspends, or amends criminal prohibitions by providing the General Assembly and the public with an advanced empirical analysis of bills affecting criminal justice.

Respectfully submitted,

Daniel J. Dew, *Columbus*
Chair, Criminal Law Committee

Elizabeth A. Mote, *Columbus*
Chair, Young Lawyer Section

Rationale for Resolution

Legislators currently do not have enough information to make informed decisions about the fiscal impact of criminal sentencing and other criminal justice reforms on both state and local government budgets.

Ohio's criminal sentencing structure, mostly contained in chapter 29 of the Ohio Revised Code, has become so convoluted that it has made it nearly impossible for legislators, advocates, and the general public to understand the implications of pending legislation that seeks to make changes to criminal laws. This has resulted in policy decisions being made in a vacuum without regard to how the changes are going to affect our overall sentencing structure.

When criminal justice legislation is introduced it is analyzed by the Legislative Service Commission in the same way that any other legislation would be analyzed. The analysis that is produced describes the criminal act that is being amended, created, or suspended and what the resulting criminal penalty would be. Missing from the analysis is any information about the fiscal impact for state and local governments, the potential increase or decrease in prison or jail population, and how the legislation interacts with other related laws or fits into the overall sentencing structure.

Decisions about criminal justice policy should must be based upon more than limited circumstances, anecdotal experience, and insufficient data. This proposal would help legislators make more informed decisions about criminal laws.

Text of Proposal

The OSBA is authorized to advocate for the creation of a nonpartisan agency to assist the legislature with understanding the implications of legislation that creates, suspends, or amends criminal prohibitions by providing the General Assembly and the public with an advanced empirical analysis of bills affecting criminal justice. The analysis shall contain the following information:

1. A description of each act that is prohibited under the bill, with the description specifying the *mens rea* and actus rea for each element of the prohibition;

2. An analysis of each act prohibited under the bill, the penalties for each act, and how the bill changes or affects existing law with respect to those acts and penalties;

3. An analysis of the manner in which the bill changes or affects provisions directly or indirectly related to the acts prohibited under the bill or the penalties related to those acts;

4. If the bill involves one or more prohibited acts that potentially subject a person who is convicted of or pleads guilty to committing the act to a prison term, an estimate of the impact of the bill's changes on prison population and corresponding fiscal impact, with the estimate determined in consultation with the Department of Rehabilitation and Correction;

5. If the bill involves one or more prohibited acts that potentially subject a person who is found to be a delinquent child for committing the act to a period of commitment in the Department of Youth Services, an estimate of the impact of the bill's changes on the department's institutional population, with the estimate determined in consultation with the department;

6. If the bill involves one or more prohibited acts that potentially subject a person who is convicted of or pleads guilty to committing the act to a jail term, an estimate of the impact of the bill's changes on jail population and corresponding fiscal impact, with the estimate determined in consultation with county officials;

7. A comparison of the law resulting from the bill to the law of other states, to the extent that information of that nature is available, and the commission believes that it is relevant and helpful to an understanding of the bill;

8. Any other information that is required by the joint committee on criminal justice or that the commission determines is relevant and helpful to an understanding of the bill.

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REPORT OF THE ESTATE PLANNING, TRUST, AND PROBATE LAW SECTION

To the Council of Delegates:

The Estate Planning, Trust and Probate Law Section requests your favorable consideration of the following proposals:

1. A proposal to amend R.C. § 2117.06 to clarify the process by which a creditor shall present a claim against an estate and specifically allow for presentation of a claim by a filing with the probate court, and to make conforming changes to R.C. § 2117.07.

2. A proposal to amend R.C. § 2107.03 to clarify the term "writing" for purposes of creating a will.

3. A proposal to amend R.C. §§ 517.23, 517.24, 517.25, and 2108.82 to be consistent with and coordinated with the Ohio right of disposition statutes (R.C. §§ 2108.70 to 2108.90).

4. A proposal to enact a new section of the Ohio Trust Code, establishing an optional process for resolving claims on conclusion of a trustee's administration of an Ohio irrevocable inter vivos trust.

5. A proposal to amend R.C. §§ 3013.05, 3013.06, 3105.171(A)(6)(a)(v) and 2106.22 in order to allow for spouses to voluntarily enter into a postnuptial agreement and to voluntarily modify or terminate an antenuptial or postnuptial agreement.

6. A proposal to amend R.C. § 2131.09 to clarify the effective date of certain provisions in the existing statute.

7. A proposal to enact new R.C. § 2131.14 to allow transfer on death beneficiary designations for tangible personal property.

Respectfully submitted,

John F. Furniss III, *Columbus*
Chair, Estate Planning, Trust, and Probate Law Section Council

PROPOSAL 1: A PROPOSAL TO AMEND R.C. § 2117.06 TO CLARIFY THE PROCESS BY WHICH A CREDITOR SHALL PRESENT A CLAIM AGAINST AN ESTATE AND SPECIFICALLY ALLOW FOR PRESENTATION OF A CLAIM BY A FILING WITH THE PROBATE COURT, AND TO MAKE CONFORMING CHANGES TO R.C. § 2117.07.

Rationale for the Proposal

Following the Supreme Court of Ohio's decision in *Wilson v. Lawrence,* 150 Ohio St.3d 368, 2017-Ohio-1410, creditors, fiduciaries, and attorneys who advise them have been uncertain what actions constitute a valid presentment of a claim against an estate within the strictly-applied six-month claims period. The *Wilson* case called into question whether anything short of personal service of a claim upon an executor or administrator would be deemed valid—and indeed several courts have since held that service upon the executor or administrator's attorney was insufficient to satisfy the statute. The proposed changes to R.C. 2117.06 and 2117.07 will make it easier for creditors, fiduciaries, attorneys, and courts to know for certain when a claim against an estate has been timely presented. The clarity these changes will reduce the frequency of controversy and related litigation and increase efficiency in the administration of estates.

Text of the Proposal

R.C. 2117.06(A)

(A) All creditors having claims against an estate, including claims arising out of contract, out of tort, on cognovit notes, or on judgments, whether due or not due, secured or unsecured, liquidated or unliquidated, shall present their claims in one of the following manners:

(1) After the appointment of an executor or administrator and prior to the filing of a final account or a certificate of termination, in one of the following manners:

(a) To the executor or administrator, or to an attorney who is identified as counsel for the executor or administrator in the probate court records for the estate of the decedent, in a writing;

(b) To the executor or administrator in a writing, and To the probate court in a writing that includes the probate court case number of the decedent's estate;

(c) In a writing that is sent by ordinary mail addressed to the decedent and that is actually received by the executor or administrator or an attorney who is identified as counsel for the executor or administrator in the probate court records for the estate of the decedent, within the appropriate time specified in division (B) of this section, without regard to whom the writing is addressed. For purposes of this subdivision (c), if an executor or administrator is not a natural person, the writing shall be considered as being actually received by the executor or administrator only if the person charged with the primary responsibility of administering the estate of the decedent actually receives the writing within the appropriate time specified in division (B) of this section.

[No changes to division (B) to (K) are proposed.]

R.C. 2117.07

An executor or administrator may accelerate the bar against claims against the estate established by section 2117.06 of the Revised Code by giving written notice to a potential

claimant that identifies the decedent by name, states the date of the death of the decedent, identifies the executor or administrator by name and mailing address, and informs the potential claimant that any claims the claimant may have against the estate are required to be presented to the executor or administrator in a writing in the manner provided in R.C. 2117.06 within the earlier of thirty days after receipt of the notice by the potential claimant or six months after the date of the death of the decedent. A claim of that potential claimant that is not presented in the manner provided by section 2117.06 of the Revised Code within the earlier of thirty days after receipt of the notice by the potential claimant or six months after the date of the death of the decedent is barred by section 2117.06 of the Revised Code in the same manner as if it was not presented within six months after the date of the death of the decedent.

PROPOSAL 2: A PROPOSAL TO AMEND R.C. § 2107.03 TO CLARIFY THE TERM "WRITING" FOR PURPOSES OF CREATING A WILL.

Rationale for the Proposal

The Council of Delegates has already approved one similar recommendation of the EPTPL Council, which dealt with foreign (non-Ohio) electronic wills. It has since been enacted in 2018 HB 595, effective March 22, 2019. The present companion proposal deals with domestic (Ohio) electronic wills.

We know that electronic wills are "out there," and that we will see more of them as more testators are "connected." Can and will Ohio give to their wills the effect they intend? R.C. 2107.03 requires that Ohio wills be "in writing," that they be "signed" by the testator, that there be two "witnesses" and that the witnesses "subscribed" the will. What do these four quoted terms mean when the will is typed on a computer or tablet, the testator types his name on the screen, and the two witnesses (who are real witnesses who are physically present with the testator) also type their names on the screen?

In the now-celebrated Ohio case *In re Estate of Castro*, No. 2013ES00140 (Lorain Cty. Probate Court), the will was written on a Samsung Galaxy tablet and the signatures of the testator and the two witnesses were made on screen with a stylus. The will was admitted to probate, but under R.C. 2107.24, our harmless error statute, as the Court held the will did not contain an attestation clause, and only after a formal hearing. The Court found that the electronic document qualified as a "writing" and that the electronic signatures on it qualified as "signed" and "subscribed," but as our law of wills does not define these terms, the Court borrowed definitions from the criminal code. Note that the signatures were handwritten using an electronic stylus; would they qualify if typed instead? The Uniform Electronic Transactions Act, R.C. 1306.01 to 1306.15, would validate typed signatures such as signatures on a contract, but specifically excepts wills from its coverage.

We need to clarify Ohio law defining these terms. The EPTPL Section proposes that Ohio law should clearly qualify the electronic writing on screen as writing under the wills statute, and qualify electronic stylus or typed signatures of the testator and witnesses as signing and subscribing under the wills statute.

This proposal is intended not to change but only to clarify existing Ohio wills law. Note specifically that it does not change the current requirement of two witnesses who are within the conscious presence (but not electronic presence) of the testator and who sign the will. It does NOT permit remote witnessing or signing of the will, eliminate all witnessing, or permit or require notarial acknowledgement of a will.

Text of the Proposal

R.C. 2107.03.

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

For purposes of this section, "in writing" means that the will is preserved on paper, electronically or on other medium so that it can be read; "signed" and subscribed" with respect to the testator and witnesses includes an electronic signature described in the Uniform Electronic Transactions Act, sections 1306.01 to 1306.23 of the Revised Code; and "conscious presence" means within the range of any of the testator's senses, excluding the sense of sight or sound that is sensed by telephonic, electronic, or distant communication.

R.C. 1306.02

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

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

~~(1) A law governing the creation and execution of wills, codicils, or testamentary trusts;~~

~~(2)~~ Chapter 1301, except section 1301.306, and Chapters 1303, 1304, 1305, 1307, 1308, and 1309 of the Revised Code.

PROPOSAL 3: A PROPOSAL TO AMEND R.C. §§ 517.23, 517.24, 517.25 and 2108.82 TO BE CONSISTENT WITH AND COORDINATED WITH THE OHIO RIGHT OF DISPOSITION STATUTES (R.C. §§ 2108.70 TO 2108.90).

Summary and Rationale for Proposal

I. Background

The Revised Code was amended to provide specific statutes assigning the right of disposition (burial or cremation) to certain persons. R.C. §§ 2108.70 to 2108.90. A person may sign a

written declaration naming persons who have the right of disposition for his/her body upon death. R.C. §2108.72. If there is no such declaration, then there is a detailed statutory order of priority assigning the right of disposition. R.C. § 2108.80. The statute has many other details providing for rights and obligations with respect to dispositions. The situation below summarizes the problem:

> Joe Smith is a widower age 74. He remarries to Gloria Swanson. Both have children from a prior marriage. Immediately after they get married, Joe signs a Declaration assigning rights of disposition to his son, Fred. He dies nine months later residing in Montgomery Co. Ohio. Fred arranges for a funeral and burial in Woodhill Cemetery in Greene Co. next to Joe's first wife. However, immediately after the funeral service but before burial, Gloria files an action in Mont. Co. Probate pursuant to R.C. § 2108.82. She has purchased two lots for her and Joe in Calvary Cemetery in Montgomery Co. and wishes for him to be buried there. The Court decides in favor of Fred since he has been assigned the right of disposition pursuant to R.C. § 2108.70(b). Fred has Joe buried in Woodhill Cemetery in Greene Co. The Court's decision is based on the factors set forth in R.C. § 2108.82.
>
> One day after the burial, Gloria files an application with the cemetery (not Court) for disinterment. Fred responds by filing an application opposing this disinterment in the Greene Co. Probate Court. The Court, following R.C. § 517.23(a) and *In Re Disinterment of Swing*, 2014-Ohio-5454 (CA Lucas Co.), holds that *Frobose* and other case law is controlling in its decision and that the provisions of the disposition statute are not applicable. The Court does not consider Joe's Declaration assignment to Fred and grants an order of disinterment according to the wishes of Gloria.

II. *In Re Disinterment of Swing*, 2014-Ohio-5454 (CA Lucas Co.)

The decedent, John Swing Jr., died on 3/14/07 and was cremated with his cremains being delivered to his parents, John Swing Sr. and Jean Swing. Michael Swing, III is the decedent's son and was a minor at the time of his death and at the time of the present litigation. Decedent's son had requested on a few occasions from his grandparents that his father's cremains be delivered to him. They denied this request. Jean Swing passed away in September of 2009 and the decedent's cremains were placed in her casket.

In October of 2012 the decedent's son, by his mother on his behalf, filed an application for disinterment. The Lucas County Probate Court granted the son's application for disinterment finding that, as the sole heir-at-law, the son was entitled to his father's cremains.

The decedent's father filed an appeal alleging the following assignments of error:

1) the Probate Court committed reversible error by failing to follow the equitable disinterment principles enunciated in the *Frobose* decision. *In re Frobose*, 163 Ohio App.3d 739, 2005-Ohio-5025, 840 N.E.2d 249 (6th Dist.)

2) The Probate Court committed reversible error by ignoring the legal rights of the father to possess the cremains of decedent to which he was entitled under the right of disposition statute R.C. § 2108.81

The Court of Appeals held that the governing statute in this case was the disinterment statute [R.C. § 517.24(B)(1)]. The Court held that in determining a request for disinterment the Court should apply the equity standard which involves consideration and weighing of several factors as set forth in the *Frobose* decision. The Court then analyzed each factor with respect to the facts of this case and upheld the Probate court's decision.

The Court then went on to analyze the provisions of R.C. § 2108.81 which lists those persons entitled to dispose of the decedent's cremains. At the time of decedent's death, his parents did have the right of disposition since the son was a minor. The appellee argued that the right of disposition was extinguished at that time and that any other interpretation of the statute would expand the right of disposition into a right of perpetual re-disposition. The Court held that the right of disposition under the statute does not preclude the Probate Court from granting an application for disinterment where the equities weigh in favor of doing so. The Court stated that R.C. § 2108.81 does not nullify the equitable standard in the *Frobose* decision.

The *Frobose* Court stated: "These equitable factors include, but are not limited to: (1) the degree of relationship that the party seeking re-interment bears to the decedent; (2) the degree of relationship that the party seeking to prevent re-interment bears to the decedent; (3) the desire of the decedent; (4) the conduct of the person seeking re-interment, especially as it may relate to the circumstances of the original interment; (5) the conduct of the person seeking to prevent re-interment; (6) the length of time that has elapsed since the original interment; and (7) the strength of the reasons offered both in favor and in opposition to re-interment."

III. Analysis

The problem with the Court's decision is first that it simply ignores a new statutory scheme which provides for the proper disposition of the decedent's body in accordance with a written declaration or statutory order of priority. The Court chose instead to rely on prior case law under the disinterment statute. The disinterment statute does not cross reference the disposition statute or in any way clarify its relationship to the disposition statute. These two statutes obviously govern the same issue (where and how the body is disposed of) and should in some way be coordinated. The inconsistency that can arise is that the authorized representative under the disposition statute can make a disposition of the body and then, some time period later, another person could file for disinterment with a different decision under a different standard set forth in the disinterment statute and case law. Thus, according to the Swing Court, we have two different standards of law applying to determine the disposition of a person's body. Of course, the priority person under the disposition statute does not necessarily have the final decision on disposition. The disposition statute, R.C. § 2108.82, does provide for a procedure for any other person to file a motion in Probate Court for a different disposition. This statute lists specific factors for the Probate Court's determination on the issue of disposition. The

Swing Court ignored the factors set forth by the legislature and instead relied on prior case law.

Another way to frame this issue is to ask the question: At what point in time do the provisions of the disposition statute apply? Initially, of course it applies immediately following death. However, over the course of time the persons named in the statute or declaration may pass away and a new person would become the priority person for a decision on disposition i.e. re-disposition or disinterment. Certainly, circumstances could change where it may be appropriate or desired by family members to make a change in the disposition. The disposition statute should continue to apply indefinitely into the future. The statute refers to the right to direct disposition as applying "after death." R.C. § 2108.70(b)(1). There is no limitation that the statute is void after the first decision on disposition. Thus, there is a right of perpetual re-disposition contrary to the argument by the appellee in the Swing case. A disinterment is a re-disposition. Whether you use the term "disposition" "re-disposition" or "disinterment", they are all referring to the same thing i.e., a decision at some point in time relating to where a body is interred or disposed of. Therefore, at any point in time in the future, the Court should then consider the provisions of the disposition statutes, specifically R.C. § 2108.82 at a hearing on disinterment. The re-disposition argument asserted by Appellee in the Swing case is not a correct interpretation of the statutes since: 1) there is no language in the disposition statute supporting such argument; 2) a decision on burial, disinterment or other re-disposition is a decision on the same issue just at different points in time; the governing law should not be different at the time shortly after death or two or twenty years later.

Text of the Proposal

R.C. 517.23. Disinterment of body buried in cemetery.

(A) Subject to divisions (B), (D), and (E) of this section, the board of township trustees, the trustees or directors of a cemetery association, or the other officers having control and management of a cemetery or the officer of a municipal corporation who has control and management of a municipal cemetery shall disinter or grant permission to disinter any remains buried in the cemetery in either of the following circumstances:

(1) ~~If the surviving spouse of the decedent is eighteen years of age or older, within thirty days after the filing of an application of the surviving spouse made in accordance with division (A) of section 517.24 of the Revised Code and payment by the applicant of the reasonable costs and expense of disinterment;~~

Within thirty days after an application for disinterment is filed with the cemetery in accordance with division (A) of section 517.24 of the Revised Code and payment of the reasonable costs and expenses of the disinterment is made by the following applicants:

(a) A designated representative, or successor, to whom the decedent had assigned the right of disposition in a written declaration pursuant to section 2108.70 of the Revised Code and who had exercised such right at the time of declarant's death;

(b) If no designated representative exercised the right of disposition pursuant to section 2108.70 of the Revised Code, the surviving spouse of the decedent who is eighteen years of age or older;

(2) On order of a probate court issued under division (B) of section 517.24 of the Revised Code and payment by the person who applied for the order under that division of the reasonable costs and expense of disinterment.

(B) No disinterment shall be made pursuant to this section and section 517.24 of the Revised Code if the decedent died of a contagious or infectious disease until a permit has been issued by the board of health of a general health district or of a city health district.

(C) Upon disinterment of remains under division (A)(1) or (2) of this section, the involved board, trustees, directors, other officers, or officer of the municipal corporation shall deliver or cause to be delivered the disinterred remains to the applicant ~~surviving spouse~~ under division (A)(1) of this section or, if the disinterment was pursuant to court order issued under division (B) of section 517.24 of the Revised Code, to the person who applied for the order under that division.

(D) The board of township trustees, the trustees or directors of a cemetery association, or the other officers having control and management of a cemetery or the officer of a municipal corporation who has control and management of a municipal cemetery may disinter or grant permission to disinter and, if appropriate, may reinter or grant permission to reinter any remains buried in the cemetery to correct an interment error in the cemetery if the board, trustees, directors, other officers, or officer of the municipal corporation comply with the internal rules of the cemetery pertaining to disinterments and if the board, trustees, directors, other officers, or officer of the municipal corporation provide notice of the disinterment to the ~~decedent's~~ ~~last known next of kin~~ the person who has been assigned the rights of disposition for the deceased person under the provisions of sections 2108.70 to 2108.90 of the Revised Code. The board, trustees, directors, other officers, or officer of the municipal corporation may correct an interment error under this division without a court order or an application by a person.

(E)

(1) A person who is an interested party and who is eighteen years of age or older and of sound mind may apply to the probate court of the county in which the decedent is buried for an order to prevent ~~the decedent's surviving spouse~~ the applicant under division (A)(1) of this section from having the remains of the decedent disinterred. An application to prevent the disinterment of the remains of the decedent shall be in writing, subscribed and verified by oath, and include all of the following:

(a) If applicable, a statement that the applicant assumed financial responsibility for the funeral and burial expenses of the decedent;

(b) If division (E)(1)(a) of this section is inapplicable relative to the applicant, a statement that the applicant did not assume financial responsibility for the funeral and burial expenses of the decedent;

(c) A statement that the applicant is eighteen years of age or older and of sound mind;

(d) The relationship of the applicant to the decedent;

(e) A statement of the applicant's reasons to oppose the disinterment of the remains of the decedent.

(2) An applicant for an order to prevent the disinterment of the remains of the decedent under division (E) of this section promptly shall give notice of the filing of the application by certified mail, return receipt requested, to the ~~decedent's surviving spouse~~ the applicant under division (A)(1) of this section. The notice shall indicate that the applicant has filed an application for an order to prevent the disinterment of the remains of the decedent.

(F) As used in this section and in section 517.24 of the Revised Code:

(1) "Cemetery" and "interment" have the same meanings as in section 1721.21 of the Revised Code.

(2) "Disinterment" means the recovery of human remains by exhumation, disentombment, or disinurnment. "Disinterment" does not include the raising and lowering of remains to accommodate two interments within a single grave and does not include the repositioning of an outside burial container that encroaches an adjoining burial space.

R.C. 517.24. Form of application for disinterment.

(A) An application by ~~a surviving spouse~~ the applicant for disinterment under division (A)(1) section 517.23 of the Revised Code shall be in writing and shall state ~~that~~ whether the applicant is the ~~surviving spouse of the decedent~~ designated representative to whom the decedent has assigned the right of disposition of the decedent's body in a written declaration pursuant to section 2108.70 of the Revised Code and had exercised such right at the time of declarant's death or, if none, the surviving spouse, that the applicant is eighteen years of age or older and of sound mind, the disease of which the decedent died, and the place at which the remains shall be reinterred. If the applicant is the designated representative to whom the decedent has assigned the right of disposition in a written declaration pursuant to section 2108.70 of the Revised Code, a copy of the declaration that appointed the applicant shall be attached to the application. If the applicant is the surviving spouse, the application shall state that to the best of the applicant's knowledge the decedent did not sign a declaration of assignment pursuant to section 2108.72 of the Revised Code or it is not available to the applicant. ~~The application shall be subscribed and verified by oath.~~

(B)

(1) A person who is eighteen years of age or older and of sound mind and who is not qualified to file an application to disinter pursuant to division (A)(1) of section 517.23 of the Revised Code ~~the surviving spouse of the decedent involved~~ may obtain a court order under this division for the disinterment of the remains of the decedent. Any person who is eighteen years of age or older and of sound mind, including, but not limited to, the person who assumed financial responsibility for the funeral and burial expenses of the decedent, and who wishes to obtain a court order for the disinterment of the remains of the decedent may file an application in the probate court of the county in which the decedent is buried requesting the court to issue an order for the disinterment of the remains of the decedent. The application shall be in writing, subscribed and verified by oath, and include all of the following:

(a) If applicable, a statement that the applicant assumed financial responsibility for the funeral and burial expenses of the decedent;

(b) If division (B)(1)(a) of this section is inapplicable relative to the applicant, a statement that the applicant did not assume financial responsibility for the funeral and burial expenses of the decedent;

(c) A statement that the applicant is eighteen years of age or older and of sound mind;

(d) The relationship of the applicant to the decedent;

(e) A statement of the place at which the remains will be reinterred;

(f) The name, the relationship to the decedent, and the address of the decedent's surviving spouse, the person who has been assigned the rights of disposition for the deceased person under the provisions of sections 2108.70 to 2108.90 of the Revised Code, of all persons who would have been entitled to inherit from the decedent under Chapter 2105. of the Revised Code if the decedent had died intestate, and, if the decedent had a will, of all legatees and devisees named in the decedent's will~~.~~;

(g) A true and correct copy of the decedent's written declaration of assignment pursuant to section 2108.70 of the Revised Code, if any, or a statement that to the best of the applicant's knowledge the decedent did not sign a written declaration of assignment or it is not available to the applicant.

(2)

(a) Subject to division (B)(2)(b) of this section, upon the filing of an application for an order for disinterment of remains under division (B) of this section, the applicant promptly shall give notice as described in this division by certified mail, return receipt requested, to the decedent's surviving spouse; the person who has been assigned the rights of disposition for the deceased person under the provisions of sections 2108.70 to 2108.90 of the Revised Code; to all persons who would have been entitled to inherit from the decedent under Chapter 2105. of the Revised Code if the decedent had died intestate; if the decedent had a will, to all legatees and devisees named in the decedent's will; and to the board of township trustees, the trustees

or directors of a cemetery association, or the other officers having control and management of the cemetery in which the remains of the decedent are interred or to the officer of a municipal corporation who has control and management of a municipal cemetery in which the remains of the decedent are interred. The notice shall indicate that an application for disinterment of the remains of the decedent has been filed.

(b) A person entitled to be given the notice described in division (B)(2)(a) of this section may waive the right to receive the notice by filing a written waiver of that right in the probate court.

(c) The fact that the notice required by division (B)(2)(a) of this section has been given, subject to division (B)(2)(d) of this section, to all persons described in division (B)(2)(a) of this section who have not waived their right to receive the notice and, if applicable, the fact that certain persons described in that division have waived their right to receive the notice in accordance with division (B)(2)(b) of this section shall be evidenced by an affidavit of the applicant for the order for disinterment, and the applicant shall file the affidavit in the probate court.

(d) An applicant for an order for disinterment is not required to give a notice pursuant to division (B)(2)(a) of this section to persons whose names or places of residence are unknown and cannot with reasonable diligence be ascertained, and the applicant shall file an affidavit in the probate court specifying any persons who were not given notice pursuant to division (B)(2)(a) of this section and the reason for not giving notice to those persons.

(3)

(a) Except as otherwise provided in division (B)(3)(b) of this section, upon the filing of an application for disinterment of remains and the giving of the required notice under division (B)(2) of this section, the probate court promptly shall conduct a hearing to determine whether to issue an order for disinterment of the remains of the decedent. Except as otherwise provided in division (B)(3)(a) of this section, ~~at the hearing, the court, in its discretion, may issue an order for disinterment of the decedent's remains if good cause for disinterment is shown~~. the Court shall conduct a hearing taking into account the provisions of section 2108.82 of the Revised Code. ~~If a person who is an interested party and who is eighteen years of age or older and of sound mind establishes by a preponderance of the evidence at the hearing that the issuance of an order for disinterment of the decedent's remains under division (B)(3) of this section would be against the decedent's religious beliefs or ascertainable desires, the court shall not issue the requested order unless the court finds a compelling reason to issue it.~~ If the court is not so prohibited from issuing the requested order and exercises its discretion to issue the requested order for disinterment of the decedent's remains in accordance with division (B)(3) of this section, the court promptly shall deliver the order to the applicant. An order of the court for disinterment of the decedent's remains shall specify that the board of township trustees, the trustees or board of the cemetery association, or other officers having control and management of the cemetery or the officer of a municipal corporation who has control and management of the municipal cemetery shall have a period of at least thirty days from the receipt of the order to perform the ordered disinterment.

(b) The court is not required to conduct a hearing under division (B)(3)(a) of this section if each person entitled to be given the notice described in division (B)(2)(a) of this section has waived that right by filing a written waiver of the right to receive the notice in the probate court.

R.C. 517.25. Writ of mandamus.

If the board of township trustees, the trustees or board of a cemetery association, or the other officers in charge of a cemetery refuse to disinter or grant permission for disinterment after ~~a surviving spouse~~ the applicant under division (A)(1) of section 517.23 of the Revised Code makes application under sections 517.23 and 517.24 of the Revised Code, the probate court of the county in which the decedent is buried shall issue a writ of mandamus requiring the officers to disinter the remains or to grant permission for their disinterment.

R.C. 2108.82. Assignment of right of disposition by probate court.

(A) Notwithstanding section 2108.81 of the Revised Code and in accordance with division (B) of this section, the probate court for the county in which the declarant or deceased person resided at the time of death may, on its own motion or the motion of another person, assign to any person the right of disposition for a declarant or deceased person.

(B) In making a determination for purposes of division (A) of this section and division (C) of section 2108.79 of the Revised Code, the court shall consider the following:

(1) Whether evidence presented to, or in the possession of the court, demonstrates that the person who is the subject of the motion and the declarant or deceased person had a close personal relationship;

(2) The reasonableness and practicality of any plans that the person who is the subject of the motion may have for the declarant's or deceased person's funeral, burial, cremation, ~~or~~ final disposition, re-disposition or disinterment including the degree to which such plans allow maximum participation by all persons who wish to pay their final respects to the deceased person;

(3) The willingness of the person who is the subject of the motion to assume the responsibility to pay for the declarant's or deceased person's funeral, burial, cremation, ~~or~~ final disposition, re-disposition or disinterment and the desires of that person;

(4) The convenience and needs of other ~~families~~ family members and friends wishing to pay their final respects to the declarant or deceased person;

(5) The express written desires of the declarant or deceased person.

(6) The religious beliefs or other evidence of the desires of the declarant or deceased person.

(7) The conduct of the persons involved in the proceedings related to the circumstances concerning the deceased person, his/her estate and other family members.

(8) The length of time that has elapsed since the original or last disposition.

(9) There shall be no disinterment or other change of the original or last disposition unless the court makes a finding of compelling reasons based upon a substantial change of circumstances since the original or last disposition. A change of circumstances shall include, but not be limited to, a change to the physical or environmental conditions of the cemetery or other location of the decedent's bodily remains or the surrounding area, the financial condition of the cemetery, a change related to the residence of the deceased person's family members or burial arrangement for said family members but shall not include a mere change of the representative who has been assigned the right to direct the disposition of the decedent's body.

(C) Except to the extent considered under division (B)(3) of this section, the following persons do not have a greater claim to the right of disposition than such persons otherwise have pursuant to law: (1) A person who is willing to assume the responsibility to pay for the declarant's or deceased person's funeral, burial, cremation, or final disposition; (2) The personal representative of the declarant or deceased person.

PROPOSAL 4: A PROPOSAL TO ENACT A NEW SECTION OF THE OHIO TRUST CODE, ESTABLISHING AN OPTIONAL PROCESS FOR RESOLVING CLAIMS ON CONCLUSION OF A TRUSTEE'S ADMINISTRATION OF AN OHIO IRREVOCABLE INTER VIVOS TRUST.

Summary and Rationale of Proposal

As recently as a few decades ago, nearly all trusts were "testamentary" trusts -- established under a will, not taking effect until the death of the settlor, and subject to the supervision of a probate court. When the trustee of such a trust was concluding its administration of the trust, the trustee would prepare a "final account," documenting all transactions of the trustee since the previous account. As part of the filing, the trustee would seek the court's approval of the account and a release of the trustee from any claims concerning its administration of the trust. The court typically would provide notice and a copy of the account to beneficiaries of the trust and provide them an opportunity to file any objections to the account or to any other matter concerning the administration of the trust. If no such objections were filed by the deadline stated in the notice, the court typically would approve the account, releasing the trustee from claims.

These days, as we know, "inter vivos" trusts -- established under a trust agreement or declaration (not a will) and taking effect during the lifetime of the settlor -- are far more common than testamentary trusts. Most inter vivos trusts do not involve any filings with the probate court. In fact, in the client's eye, that is one of the primary advantages of an inter vivos trust: it allows the settlor to accomplish his or her trust objectives without exposing private financial or personal matters to the public eye.

Many inter vivos trusts are administered by individual persons, such as a trusted family member of the settlor or a lawyer or accountant. Other inter vivos trusts are administered by professional trustees. But whoever is serving as trustee is often taking on difficult issues such as tax matters, family dysfunction, a closely held business in which some family members are involved, or other beneficiary issues such as tender age, financial irresponsibility, spousal or creditor issues, or substance abuse. The trustee is often placed in a difficult position by dealing with these and other trust matters. Even adroit performance of the trustee's duties can sometimes create friction or worse with the affected beneficiaries. Those issues can, in turn, ripen into disputes. Therefore, when a trustee of an inter vivos trust is concluding his administration of the trust, it makes sense that he would seek to bring to orderly closure any issues that may have arisen in the course of that administration or that may arise after the trustee's involvement with the trust concludes.

With this objective in mind, a few professional trustees have in recent years been requiring trust beneficiaries to sign written agreements, containing not only releases of the trustee but broad indemnification provisions, before concluding administration of Ohio irrevocable trusts. This practice has led to controversy, with some critics claiming trustee overreach.

The purpose of this proposed legislation is to provide a fair, optional process under which the trustee of an Ohio irrevocable, inter vivos trust may seek the same kind of finality and closure that is available to trustees of Ohio testamentary trusts, while affording beneficiaries a reasonable opportunity, as they would have in the probate court, to assert any objections or claims they might have concerning the trust without being subjected to indemnification clauses. Somewhat similar statutes have been enacted recently in both Kentucky and Indiana. Some highlights of the proposed Ohio statute are:

1. The statute applies only to Ohio irrevocable trusts. It does not apply to a revocable trust so long as it remains revocable. It also does not apply to a testamentary trust subject to the supervision of a probate court.

2. The statute applies to two scenarios involving conclusion of a trustee's administration of an irrevocable trust: (a) when the trust is to terminate as a result of one or more "trust-terminating distributions" or (b) when the trustee is resigning, or has been removed, and will be departing the administration and delivering the trust assets to a successor trustee.

3. The statute establishes a purely optional process. A trustee who is about to make trust-terminating distributions, or who is resigning or has been removed, may, but is not required to, use the process established in the statute.

4. If the trustee elects to use the process established in the statute, he must send a written notice, and up to four years of trustee reports, to specified persons, including at least all of the current beneficiaries of the trust.

5. The statute prohibits the trustee who elects to use the statutory process from including an indemnification clause in the written notice or trustee reports or in any documentation served with the notice and reports.

6. The written notice must include a number of specific items of information, including an exhibit showing the assets of the trust, and must describe the action proposed by the trustee: terminating distributions to named beneficiaries or delivery of the trust assets to a named successor trustee. The notice must also provide the name, address and telephone number of the trustee, so that those receiving the notice will know to whom they may direct any objections they have concerning the proposed action or the administration of the trust.

7. The process affords those receiving the notice 45 days in which to provide the trustee with written notice of any objection to the trustee's proposed action or any other objection concerning the trustee's administration of the trust.

8. If the trustee receives no written objections within the 45-day period:

    a. The notice and trustee's reports will be considered approved by each notice recipient;

    b. The trustee must, within a reasonable period of time after expiration of the objection period, distribute or deliver the assets as proposed in the notice; and

    c. Those who received the notice and reports will be barred from bringing a claim against the trustee, and from challenging the validity of the trust, to the same extent, and with the same preclusive effect, as if the court had entered a final order approving and settling the trustee's full account of its administration of the trust.

The proposed statute represents the EPTPL Section Council's response to the need for an optional, orderly process for resolving claims on the conclusion of a trustee's administration of an Ohio irrevocable inter vivos trust. The process established under the statute balances the trustee's desire for finality with trust beneficiaries' need for meaningful notice, information and an opportunity to object.

Text of the Proposal

Optional Process for Resolving Claims on Conclusion of Trust Administration

(A) A trustee may but is not required to use the provisions of division (C) or division (D) of this section, as applicable, when concluding the trustee's administration of an irrevocable trust. This section does not apply to a testamentary trust subject to the supervision of a probate court. Except as otherwise provided in the Revised Code or other applicable law, including the common law, the provisions of divisions (C) or (D) of this section may be used in combination with or in lieu of other options or proceedings available under the Revised Code or other applicable law, including the common law.

(B) As used in this section:

(1) "Applicable reporting period" means the most recent four (4) years as of the date of preparation of a notice authorized by division (C) or division (D) of this section or, if the trust became irrevocable during such four (4) year period, the period from the date the trust became irrevocable to the date of preparation of the notice. If the trustee sending the notice accepted the trusteeship during the period described in the preceding sentence, the "applicable reporting period" shall be from the date of its acceptance to the date of preparation of the notice.

(2) "Departing trustee" means a trustee who is resigning or has been removed as trustee of a trust.

(3) "Distributions objection period" means a forty-five (45) day period for providing the trustee of the noticing trust with objections under paragraph (3) of division (C) of this section. The period commences with the date the notice and trustee's reports described in division (C) of this section are served on the recipient.

(4) "Noticing trust" means a trust whose trustee is serving or has served a notice and trustee reports under division (C) or division (D) of this section

(5) "Person" has the meaning set forth for that term in section 5801.01 of the Revised Code.

(6) Resignation or removal necessary parties" means the persons described in subparagraphs (a), (b) and (c) of this paragraph (6) of division (B). Those persons include:

(a) The following persons:

(i) In the case of a trustee resignation:

A. If the trust terms identify one or more persons to whom notice of the trustee's resignation must be provided, the persons so identified and any other persons who are current beneficiaries of the trust, determined as of the date of the notice described in division (D) of this section; or

B. If the trust terms do not identify any persons to whom notice of the trustee's resignation must be provided, the qualified beneficiaries of the trust, determined as of the date of the notice described in division (D) of this section.

(ii) In the case of a trustee removal, the persons, if any, to whom notice of trustee removal is required to be provided under the trust terms and any other persons who are current beneficiaries of the trust, determined as of the date of the notice described in division (D) of this section.

(b) Any co-trustee of the trust; and

(c) The successor trustee if one has been appointed or designated as provided in the trust terms or otherwise appointed as provided in section 5807.04(C) of the Revised Code or pursuant to other applicable law.

(7) "Successor trustee" means a person, not previously serving as a co-trustee, who is to replace the departing trustee following the departing trustee's resignation or removal.

(8) "Terminating distributions necessary parties" means:

(a) The current beneficiaries of the trust, determined as of the date of the notice described in division (C) of this section;

(b) If the trust-terminating distributions include one or more mandatory distributions under the terms of the trust, all other persons living at the date of the notice who were current beneficiaries of the trust immediately prior to the triggering event that is the basis for the mandatory distributions; and

(c) Any co-trustee of the trust.

(9)"Triggering event" means any event, such as a death, age attainment or other circumstance, that has occurred and that is the basis for a mandatory distribution under the terms of the trust.

(10) "Trust-terminating distributions" means distributions that, when completed, will distribute the remaining net assets of a trust and thereby effectively terminate the trust, including, without limitation, any such distributions that are made pursuant to section 5808.18 of the Revised Code or under any similar statutory or common law applicable to the trust.

(11) "Trustee indemnification clause" means a provision that indemnifies the trustee against loss arising from a claim relating to the trustee's administration of the trust.

(12) "Trustee's report" means a report as described in section 5808.13(C) of the Revised Code.

(13) "Trustee succession objection period" means a forty-five (45) day period for providing to the departing trustee objections under paragraph (3) of division (D) of this section. The period commences with the date the notice and trustee's reports described in division (D) of this section are served on the recipient.

(C) When a trust is to terminate as a result of trust-terminating distributions and the trustee elects to use the provisions of this division, the trustee, within a reasonable period of time after the event or determination that requires or authorizes such distributions, shall serve on the terminating distributions necessary parties, and may serve on other persons who the trustee

reasonably believes may have an interest in the trust, the documents and information described in subparagraphs (a) and (b) of paragraph (1) of this division (C).

(1) The documents and information to be served include:

(a) A written notice, executed by or on behalf of the trustee, that includes the following information:

(i) The date of the notice, corresponding to the date the notice is being sent;

(ii) A description of the terms of the trust that require or authorize the trust-terminating distributions or a citation to any statute that requires or authorizes the distributions;

(iii) If any of the proposed trust-terminating distributions is mandatory under the terms of the trust, a description of any triggering event that is the basis for such distribution;

(iv) A description of the proposed trust-terminating distributions that includes the names of the proposed distributees and a description, in general or specific terms, of the assets proposed for distribution to each;

(v) A description of the distributions objection period and the name, mailing address, email address if available and telephone number of the person or office associated with the trustee to which any written objections should be sent;

(vi) A description of the process, described in paragraph (2) of this division (C), that will be followed if the trustee receives no written objections within the distributions objection period;

(vii) A description of the process, described in paragraph (3) of this division (C), that will be followed if the trustee receives a written objection within the distributions objection period;

(viii) A statement of the impending bar of claims against the trustee, as described in paragraph (5) of this division (C), that will result if an objection is not timely made;

(ix) A statement that the trustee may rely upon the written statement of a recipient of the notice that such person consents to the proposed trust-terminating distributions and irrevocably waives the right to object to the distributions and any claim against the trustee for matters disclosed in the notice or the trustee's reports served with it and all other matters pertaining to the trustee's administration of the trust;

(x) A statement that the trustee may complete the distributions described in the notice prior to the expiration of the distributions objection period if all of the persons on whom the notice was served deliver to the trustee written consents and irrevocable waivers of the kind described in Paragraph (1)(a)(ix) of this division (C);

(xi) An exhibit showing the assets on hand at the date the notice is prepared and their respective values as shown in the regularly kept records of the trustee; and

(xii) An estimate of any assets, income, taxes, fees, expenses, claims or other items reasonably expected by the trustee to be received or disbursed before completion of the trust-terminating distributions but not yet received or disbursed, including trustee fees remaining to be paid.

(b) One or more trustee's reports covering the applicable reporting period.

(2) If no written objection is received by the trustee within the distributions objection period:

(a) The notice and trustee's reports served pursuant to paragraph (1) of this division (C) shall be considered approved by each recipient of the notice and reports;

(b) The trustee, within a reasonable period of time following the expiration of the distributions objection period, shall distribute the assets as provided in the notice; and

(c) Any person who was served such notice and reports shall be barred from bringing a claim against the trustee, and from challenging the validity of the trust, as provided in paragraph (5) of this division (C).
(5) of this division (C).

(3) If, after being served the notice and trustee's reports described in paragraph (1) of this division (C), a qualified beneficiary or any other recipient of the notice wishes to object to matters disclosed in the notice or trustee's reports served or any other matter pertaining to the trustee's administration of the trust, such person shall provide written notice of the objection to the trustee of the noticing trust within the distributions objection period. If the trustee receives a written objection within the distributions objection period, the trustee may:

(a) Submit the written objection to the court for resolution and charge the expense of commencing, conducting and concluding such a proceeding as ordered by the court; or

(b) Resolve the objection with the objecting person by accepting a withdrawal of such person's objection or by written instrument, a written agreement as described in section 5801.10 of the Revised Code, or other means. Any agreement or other written instrument executed by the objecting party pursuant to this paragraph (3)(b) may include a release and a trustee indemnification clause, along with other terms agreed to

by the parties. Reasonable expenses related to such written instrument or written agreement shall be charged to the trust.

Within a reasonable time after resolution of all timely objections under this paragraph (3), the trustee shall distribute the remaining trust assets as provided in the notice, subject to any modifications provided for in the terms of the court order, written instrument, written agreement or other document setting forth the resolution of each such objection.

(4) The trustee may rely upon the written statement of a recipient of the notice and trustee's reports served under this division (C) that the recipient consents to the proposed trust-terminating distributions, irrevocably waives the right to object to the distributions, and irrevocably waives any claims against the trustee for breach of trust as to matters disclosed in the notice and trustee's reports and all other matters pertaining to the trustee's administration of the trust. The distributions described in the notice may be completed prior to the expiration of the distributions objection period if all of the persons on whom the notice and trustee's reports were served have delivered to the trustee similar written consents and irrevocable waivers.

(5) Any person who was served a notice and trustee's reports that comply with the requirements of paragraph (1) of this division (C) and who either consented to the proposed trust-terminating distributions or failed to timely provide the trustee a written objection as described in paragraph (3) of this division (C) is barred from bringing a claim against the trustee for breach of trust as to matters disclosed in the notice and trustee's reports and all other matters pertaining to the trustee's administration of the trust, and from challenging the validity of the trust, to the same extent and with the same preclusive effect as if the court had entered a final order approving and settling the trustee's full account of its entire administration of the trust, notwithstanding the limitations periods otherwise applicable under section 5810.05 of the Revised Code. If all of the terminating distributions necessary parties and all qualified beneficiaries of the trust have been served a notice and trustee's reports that comply with the requirements of paragraph (1) of this division (C) and have either consented to the proposed trust-terminating distributions or failed to timely provide the trustee a written objection as described in paragraph (3) of this division (C), all other beneficiaries of the trust, including but not limited to persons who may succeed to the interests in the trust of the beneficiaries served, shall be barred to the same extent and with the same preclusive effect as provided in the first sentence of this paragraph. The bar of claims under this paragraph (5) of division (C) applies to each person barred, his or her personal representatives and assigns, and his or her heirs who are not beneficiaries of the noticing trust.

(6) Any beneficiary who receives trust assets as a result of a trust-terminating distribution described in the notice described in paragraph (1) of this division (C) and who is barred from bringing claims under paragraph (5) of this division (C) may be required to return all or any part of the value of the distribution if the trustee determines that the return of assets is necessary to pay, or reimburse the trustee for payment of, taxes, debts, or expenses of the trust, including, but not limited to, reasonable expenses incurred by the trustee in obtaining the return of assets under this division. The beneficiary shall return

such part or all of the value of the distribution expeditiously upon receipt of a written notice from the trustee requesting the return of assets under this division.

(D) When a trustee resigns or is removed from an irrevocable trust pursuant to the terms of the trust or otherwise, the departing trustee that elects to use the provisions of this division (D), within a reasonable period of time after such resignation or removal, shall serve on the resignation or removal necessary parties, and may serve on other persons who the trustee reasonably believes may have an interest in the trust, the documents and information described in subparagraphs (a) and (b) of paragraph (1) of this division (D).

(1) The documents and information to be served include:

(a) A written notice, executed by or on behalf of the departing trustee, that includes the following information:

(i) The date of the notice, corresponding to the date the notice is being sent;

(ii) A description of any terms of the trust or the Revised Code relevant to the resignation or removal of the departing trustee and the provisions, if applicable, regarding the appointment or designation of the successor trustee;

(iii) A description of any actions taken by the departing trustee, the beneficiaries of the trust or other required parties pertaining to the resignation or removal of the departing trustee and, if applicable, the appointment or designation of the successor trustee;

(iv) The name and address of the successor trustee, if one has been appointed or designated;

(v) If applicable, a statement confirming the successor trustee's acceptance of the trusteeship;

(vi) A description of the trustee succession objection period and the name, mailing address, email address if available and telephone number of the person or office associated with the departing trustee to which any written objections should be sent;

(vii) A description of the process, described in paragraph (2) of this division (D), that will be followed if the departing trustee receives no written objections within the trustee succession objection period;

(viii) A description of the process, described in paragraph (3) of this division (D), that will be followed if the departing trustee receives a written objection within the trustee succession objection period;

(ix) A statement of the impending bar of claims against the departing trustee, as described in paragraph (5) of this division (D), that will result if an objection is not timely made;

(x) A statement that the departing trustee may rely upon the written statement of a recipient of the notice that such person consents to the delivery of the net assets of the trust to the successor trustee, or to one or more co-trustees as applicable, and irrevocably waives the right to object to the delivery of the assets and any claim against the departing trustee for matters disclosed in the notice or the trustee's reports served with it and all other matters pertaining to the departing trustee's administration of the trust;

(xi) A statement that the departing trustee may complete the delivery of the net assets of the trust to the successor trustee, or to one or more co-trustees as applicable, prior to the expiration of the trustee succession objection period if all of the persons on whom the notice was served deliver to the trustee written consents and irrevocable waivers of the kind described in Paragraph (1)(a)(x) of this division (D);

(xii) An exhibit showing the assets on hand at the date the notice is prepared and their respective values as shown in the regularly kept records of the trustee; and

(xiii) An estimate of any assets, income, taxes, fees, expenses, claims or other items reasonably expected by the departing trustee to be received or disbursed before delivery of the net assets of the trust to the successor trustee, or to one or more co-trustees as applicable, but not yet received or disbursed, including trustee fees remaining to be paid.reports covering the applicable reporting period.

(b) One or more trustee's reports covering the applicable reporting period.

(2) If no written objection is received by the departing trustee within the trustee succession objection period:

(a) The notice and trustee's reports served pursuant to paragraph (1) of this division (D) shall be considered approved by each recipient of the notice and reports;

(b) The departing trustee, within a reasonable period of time following the expiration of the trustee succession objection period, shall deliver the net trust assets to the successor trustee or to one or more co-trustees as applicable; and

(c) Any person who was served such notice and reports shall be barred from bringing a claim against the trustee, and from challenging the validity of the trust, as provided in paragraph (5) of this division (D).

(3) If, after being served the notice and trustee's reports described in paragraph (1) of this division (D), a qualified beneficiary or any other recipient of the notice wishes to object to matters disclosed in the notice or trustee's reports served or any other matter pertaining to the departing trustee's administration of the trust, such person shall provide written notice of the objection to the departing trustee within the trustee succession objection period. If the departing trustee receives a written objection within the trustee succession objection period, the departing trustee may:

(a) Submit the written objection to the court for resolution and charge the expense of commencing, conducting and concluding such a proceeding as ordered by the court; or

(b) Resolve the objection with the objecting person by accepting a withdrawal of such person's objection or by written instrument, a written agreement as described in section 5801.10 of the Revised Code, or other means. Any agreement or other written instrument executed by the objecting party pursuant to this paragraph (3)(b) may include a release and a trustee indemnification clause, along with other terms agreed to by the parties. Reasonable expenses related to such written instrument or written agreement shall be charged to the trust.

Within a reasonable time after resolution of all timely objections under this paragraph (3), the departing trustee shall deliver the net trust assets to the successor trustee, or to one or more co-trustees as applicable, subject to any modifications provided for in the terms of the court order, written instrument, written agreement or other document setting forth the resolution of each such objection.

(4) The departing trustee may rely upon the written statement of a recipient of the notice and trustee's reports served under this division (D) that the recipient consents to, and irrevocably waives the right to object to, the departing trustee's resignation or removal, the appointment of the successor trustee, if applicable, and delivery of the net assets of the trust to the successor trustee or to one or more co-trustees as applicable, and irrevocably waives any claims against the departing trustee for breach of trust as to matters disclosed in the notice and trustee's reports and all other matters pertaining to the departing trustee's administration of the trust. The delivery of the net assets of the trust to the successor trustee, or to one or more co-trustees as applicable, may be completed prior to the expiration of the trustee succession objection period if all of the persons on whom the notice and trustee's reports were served have delivered to the departing trustee similar written consents and irrevocable waivers.

(5) Any person who was served a notice and trustee's reports that comply with the requirements of paragraph (1) of this division (D) and who either consented to the delivery of the net

assets of the trust to the successor trustee or one or more co-trustees as applicable or failed to timely provide the departing trustee a written objection as described in paragraph (3) of this division (D) is barred from bringing a claim against the departing trustee for breach of trust as to matters disclosed in the notice and trustee's reports and all other matters pertaining to the departing trustee's administration of the trust, and from challenging the validity of the trust, to the same extent and with the same preclusive effect as if the court had entered a final order approving and settling the departing trustee's full account of its entire administration of the trust, notwithstanding the limitations periods otherwise applicable under section 5810.05 of the Revised Code. If all of the resignation or removal necessary parties and all qualified beneficiaries of the trust have been served a notice and trustee's reports that comply with the requirements of paragraph (1) of this division (D) and have either consented to the delivery of the net assets of the trust to the successor trustee or failed to timely provide the trustee a written objection as described in paragraph (3) of this division (D), all other beneficiaries of the trust, including but not limited to persons who may succeed to the interests in the trust of the beneficiaries served, shall be barred to the same extent and with the same preclusive effect as provided in the first sentence of this paragraph. The bar of claims under this paragraph (5) of division (D) applies to each person barred, his or her personal representatives and assigns, and his or her heirs who are not beneficiaries of the noticing trust. Any person who is barred under the preceding sentences of this paragraph from bringing a claim against the departing trustee is barred to the same extent from bringing a claim against the successor trustee for failure to object to a matter that is subject to the bar of claims against the departing trustee.

(E) The trustee's substantial compliance in good faith with the requirements concerning the contents of the notices described in divisions (C) and (D) shall be deemed sufficient.

(F) If a notice and trustee's reports under division (C) or division (D) of this section are served upon the personal representative for the estate of a deceased beneficiary of the noticing trust or upon the trustee of a subtrust that is a beneficiary of the noticing trust and upon one or more beneficiaries of the estate or subtrust whose fiduciary is served, and if both the fiduciary of the estate or subtrust and a beneficiary of that estate or subtrust who are served consent to the proposed distributions or delivery of assets described in the notice or fail to object within the applicable objection period, the beneficiary of the estate or subtrust who is subject to the claims bar with respect to the administration of the noticing trust shall be barred to the same extent from bringing a claim against the fiduciary of the estate or subtrust for failure to object to a matter that is subject to the bar of claims against the trustee of the noticing trust.

(G) The notices and trustee's reports served by the trustee under the terms of divisions (C) and (D) shall be served on a person by:

(1) Handing them to the person; or

(2) Leaving them:

(a) At the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or

(b) At the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or

(3) Mailing them to the person's last known address by United States mail, in which event service is complete upon mailing; or

(4) Delivering them to a commercial carrier service for delivery to the person's last known address within three calendar days, in which event service is complete upon delivery to the carrier; or

(5) Sending them by electronic means to a facsimile number or e-mail address provided by the person to be served or his or her attorney, in which event service is complete upon transmission, but is not effective if the trustee of the noticing trust learns that they did not reach the person.

(H) No trustee shall request or include a trustee indemnification clause in the notice and trustee's reports served under division (C) or division (D) or in any documentation served by the trustee with the notice and trustee's reports. However, in the event such notice and trustee's reports are served and a written objection is received by the trustee within the applicable objection period, a trustee indemnification clause may be included in an agreement or other written instrument executed by the objecting party pursuant to paragraph (3)(b) of division (C) or paragraph (3)(b) of division (D).

PROPOSAL 5: A PROPOSAL TO AMEND R.C. §§ 3013.05, 3013.06, 3105.171(A)(6)(A)(V) AND 2106.22 IN ORDER TO ALLOW FOR SPOUSES TO VOLUNTARILY ENTER INTO A POSTNUPTIAL AGREEMENT AND TO VOLUNTARILY MODIFY OR TERMINATE AN ANTENUPTIAL OR POSTNUPTIAL AGREEMENT.

Rationale for the Proposal

For over 130 years in Ohio, spouses have been legally capable of entering into agreements with each other as if unmarried except to the extent an agreement alters the legal relations between the spouses. Legal relations between spouses are those rights and responsibilities that exist solely by reason of the marriage (e.g., right to inherit, election against the will, right to administer the estate, property division, spousal support, etc.). Currently, in Ohio, for spouses to have an enforceable agreement between themselves that alters their legal relations, such agreement must have been entered into prior to the marriage and once entered into cannot be amended or terminated irrespective of the spouses' desire to do so or changes in circumstances. The validity and enforceability of antenuptial agreements in Ohio are governed by a long history of judicial decisions.

Ohio is one of only four states that do not permit postnuptial agreements and one of only two states that specifically prohibit postnuptial agreements by statute. The Ohio statute prohibiting postnuptial agreements was passed in 1887 and has gone unchanged to this date.

The proposal is in response to:

a. growing demand by spouses to be allowed to voluntarily define their mutual rights and responsibilities that can be changed and evolve with the marriage;
b. significant tax law changes impacting the intended outcome of existing antenuptial agreements;
c. increased uncertainty in Ohio of enforcement of antenuptial agreements which were entered into years ago that cannot be amended during the marriage to remain fair and reasonable in light of changed circumstances;
d. increased cases of spouses attempting to enter into postnuptial agreements or attempting to amend existing antenuptial agreements for marriage harmony regardless of the unenforceability of such agreements;
e. rising trend of multiple marriages, children from prior relationships and gender equality; and,
f. allowance of postnuptial agreements in competing states.

The proposal would permit spouses to voluntarily enter into agreements with each other that alter their legal relations, as well as voluntarily modify or terminate agreements entered into prior to or during the marriage.

In order to accomplish the intent of the proposal, amendments to four sections of the Revised Code (R.C. §§ 3103.05, 3103.06, 3105.171(A)(6)(a)(v), and 2106.22) are required.

First, the additions to R.C. § 3103.05 require any agreement between spouses that alter their legal relations comply with the additional requirements set forth in R.C. § 3103.06.

Second, R.C. § 3103.06 will allow spouses to (i) enter into a postnuptial agreement, (ii) modify or terminate an antenuptial agreement or postnuptial agreement (unless the agreement expressly provides otherwise), and (iii) agree to an immediate separation and make provisions for the division of property and support of each other and their children during the separation. An agreement entered into under this section is required to be in writing and signed by both parties and the common law of antenuptial agreements will apply to such agreements except to the extent inapplicable or modified by this section.

Third, the addition to R.C. § 3105.171(A)(6)(a)(v) will treat a valid postnuptial agreement the same as a valid antenuptial agreement in determining a spouse's separate property.

Fourth, the addition to R.C. § 2106.22 will treat a postnuptial agreement the same as an antenuptial or separation agreement in actions to set aside such agreements upon the death of one of the parties.

Text of the Proposal

R.C. 3103.05. Contracts.

A husband or wife Spouses may enter into any engagement agreement or transaction with the each other, or with any other person, which either might if unmarried; subject, in agreements or transactions between themselves spouses, to the general rules which that control the actions of persons occupying confidential relations with each other; and to the extent an agreement alters the legal relations between the spouses, such agreement shall comply with requirements of section 3103.06.

R.C. 3103.06. Contracts Affecting Marriage.

A husband and wife cannot, by any contract with each other, alter their legal relations, except that they may agree to an immediate separation and make provisions for the support of either of them and their children during the separation.

Spouses may by agreement do one or more of the following:

(A) Alter their legal relations with each other;

(B) Modify or terminate any written agreement affecting their legal relations with each other, whether such agreement was entered into by the parties prior to or during the marriage, unless expressly provided otherwise by the parties in their agreement; and

(C) Agree to an immediate separation and make provisions for the division of property and/or for the support of either of them and their children during the separation.

An agreement entered into pursuant to this section shall be: in writing; signed by both spouses; and, if entered into after the date of the marriage of the parties, enforceable without consideration. The common law of antenuptial agreements shall apply to agreements entered into pursuant to this section except to the extent inapplicable or as modified by this section or another section of the Revised Code.

R.C. 3105.171(A)(6)(a)(v). Equitable division of marital and separate property – distributive award.

(v) Any real or personal property or interest in real or personal property that is excluded by a valid antenuptial or postnuptial agreement;

R.C. 2106.22. Action to set aside antenuptial, postnuptial or separation agreement.

Any antenuptial, postnuptial, or separation agreement to which a decedent was a party is valid unless an action to set it aside is commenced within four months after the appointment of the executor or administrator of the estate of the decedent, or unless, within the four-month period, the validity of the agreement otherwise is attacked.

PROPOSAL 6: A PROPOSAL TO AMEND R.C. § 2131.09 TO CLARIFY THE EFFECTIVE DATE OF CERTAIN PROVISIONS IN THE EXISTING STATUTE.

Rationale for the Proposal

It has become apparent that there is confusion among practitioners who draft trust instruments as to the effective date of certain provisions of R.C. § 2131.09 as it was enacted effective March 22, 1999 and as it was amended effective March 27, 2013. Some of the 2013 amendments were clarifying and therefore intended to be effective retroactive to March 22, 1999 and others were substantive changes that were to be applied prospectively.

R.C. § 2131.09(B), as enacted effective March 22, 1999, allowed the settlor of a trust to opt-out of the application of R.C. § 2131.08 (Ohio's codification of the rule against perpetuities or "RAP"), to interests in property created under the terms of the trust agreement, provided certain conditions set forth in the statute were met. Effective as of March 27, 2013, R.C. § 2131.09 was amended to clarify provisions of R.C. § 2131.09(B) as originally enacted (on March 22, 1999) and to limit the restriction on the exercise of non-general powers of appointment granted in a trust agreement that opts out of the RAP. In the 2013 amendment, division (B)(4) of R.C. § 2131.09 was eliminated and division (B)(3)(d) and division (C) were added to allow the opt-out to apply to the exercise of such powers, but requiring vesting of interests created pursuant to such exercise to vest within 1000 years of the creation of the power. The removal of the total restriction and the addition of the 1000 year vesting period were effective as of the date of the amendment—March 27, 2013.
In 2012, the Legislative Services Commission mark-up of the changes to R.C. § 2131.09 made reference in three places to "the effective date of this Section." According to LSC personnel who marked up the proposed statutory change at that time, that reference meant the effective date of the amendment. At the time legislation is passed amending a statute, it is impossible to state specifically its effective date, thus the non-specific reference to the effective date.

Unfortunately, this has created confusion over the interpretation of the reference to "effective date of this section," some lawyers incorrectly interpreting it as meaning it is retroactively effective to the original enactment of R.C. § 2131.09(B) and (C) on March 22, 1999.[1] The amended provisions relating to interests created by exercises of non-general powers of appointment, were intended to apply only prospectively because a retroactive effect date for those provisions would raise constitutionality concerns. The references in divisions (B)(3)(d) and (C) to the effective date apply to the provisions intended to apply only prospectively and thus should be changed by deleting "effective date of this section" and replacing it with "March 27, 2013." On the other hand, the other changes made to division (B) and the addition of divisions (D) and (F) were clarifying provisions, not intended to change existing law, and were intended to be effective as of March 22, 1999. Division (E) of R.C. § 2131.09 should be amended as indicated to make this clarifying change.

Text of the Proposal

[1] Note that such an interpretation cannot be correct because the portion of R.C. § 2131.09 that is now Division (A) was enacted long before 1999 and thus the "section" has an effective date long before the amendments to it in 1999 and 2013.

R.C. 2131.09. Exemption of certain trusts

(A) A trust of real or personal property created by an employer as part of a stock bonus plan, pension plan, disability or death benefit plan, or profit-sharing plan, for the benefit of some or all of the employees, to which contributions are made by the employer or employees, or both, for the purpose of distributing to the employees or their beneficiaries the earnings or the principal, or both earnings and principal, of the fund so held in trust is not invalid as violating the rule against perpetuities, any other existing law against perpetuities, or any law restricting or limiting the duration of trusts; but the trust may continue for the time that is necessary to accomplish the purposes for which it was created. The income arising from any trust within the classifications mentioned in this division may be accumulated in accordance with the terms of the trust for as long a time as is necessary to accomplish the purposes for which the trust was created, notwithstanding any law limiting the period during which trust income may be accumulated. No rule of law against perpetuities or the suspension of the power of alienation of the title to property invalidates any trust within the classifications mentioned in this division unless the trust is terminated by decree of a court in a suit instituted within two years after June 25, 1951.

(B)

(1) No rule of law against perpetuities or suspension of the power of alienation of the title to property, any other existing law against perpetuities, or any law restricting or limiting the duration of trusts shall apply with respect to any interest in real or personal property held in trust if both of the following apply:

(a) The instrument creating the trust specifically states that the rule against perpetuities or the provisions of division (A) of section 2131.08 of the Revised Code shall not apply to the trust .

(b) The trustee has unlimited power, or one or more persons have the unlimited power to direct the trustee or to approve the trustee's decision, either to sell all trust assets or to terminate the entire trust.

(2) Division (B)(1) of this section shall apply to the interpretation of a testamentary or inter vivos trust instrument that creates an interest in real or personal property in relation to which one or more of the following conditions apply:

(a) The instrument creating the testamentary or inter vivos trust is executed in this state.

(b) The sole trustee or one of the trustees is domiciled in this state.

(c) The testamentary or inter vivos trust is administered in this state or the situs of a substantial portion of the assets subject to the testamentary portion of the testamentary or inter vivos trust is in this state, even though some part or all of those assets are physically deposited for safekeeping in a state other than this state.

(d) The instrument creating the testamentary or inter vivos trust states that the law of this state is to apply.

(3) Subject to division (C) of this section, division (B) of this section shall be effective with respect to all of the following:

(a) An interest in real or personal property in trust created under the terms of a will of a decedent dying on or after March 22, 1999;

(b) An interest in real or personal property created under the terms of an inter vivos or testamentary trust instrument executed on or after March 22, 1999;

(c) An interest in real or personal property in trust created by the exercise of a general power of appointment on or after March 22, 1999;

(e) An interest in real or personal property in trust created by the exercise of a nongeneral power of appointment over any portion of a trust that meets the requirements of division (B) of this section, but only if the date of creation of that nongeneral power of appointment is on or after March 27,

(C) The exercise of a nongeneral power of appointment granted over any portion of a trust to which the rule against perpetuities does not apply because the terms of the trust meet the requirements of division (B) of this section shall nevertheless be subject to section 2131.08 of the Revised Code, except that interests created pursuant to the exercise of a nongeneral power of appointment that has a date of creation on or after March 27, 2013 shall be required to vest not later than one thousand years after the date of creation of that power.

(D) For purposes of this section, the instrument creating a trust subject to a power reserved by the grantor to amend, revoke, or terminate the trust shall include the original instrument establishing the trust and all amendments to the instrument made prior to the time at which the reserved power expires by reason of the death of the grantor, by release of the power, or otherwise.

(E) The amendment of division (B)(1) of this section and divisions (D) and (F) of this section are intended to clarify the provisions of divisions (B) and (C) of this section as originally enacted and apply to trust instruments that are in existence prior to, on, or after March 22, 1999.

(F) For purposes of this section:

(1) General power of appointment" means a power that is exercisable in favor of the individual possessing the power, the individual's estate, the individual's creditors, or the creditors of the individual's estate other than either of the following:

(a) A power that is limited by an ascertainable standard as defined in section 5801.01 of the Revised Code;

(b) A power of withdrawal held by an individual, but only to the extent that it does not exceed the amount specified in section 2041(b)(2) or 2514(e) of the "Internal Revenue Code of 1986," 100 Stat. 2085, 26 U.S.C. 1 et seq., as amended.

(2) "Nongeneral power of appointment" means any power of appointment that is not a general power of appointment.

(3) The "date of creation" of a nongeneral power of appointment created by the exercise of one or more powers of appointment, except by the exercise of a general power of appointment exercisable by deed, shall be the date of creation of the first of those powers of appointment to be exercised.

(4) "Exercisable by deed" has the same meaning as in section 2131.08 of the Revised Code.

PROPOSAL 7: A PROPOSAL TO ENACT NEW SECTION 2131.14 OF THE REVISED CODE TO ALLOW TRANSFER ON DEATH BENEFICIARY DESIGNATIONS FOR TANGIBLE PERSONAL PROPERTY.

Rationale for the Proposal

This proposal originates from a committee of the EPTPL Section Council that was originally charged with the task of drafting a statute which would permit a testator to bequeath his or her tangible personal property pursuant to an executed separate writing which would be legally enforceable even if the writing was written and executed by the testator after the execution of his Will. The goal was to provide an easy method for a testator to identify specific items of tangible personal property to pass to designated beneficiaries after a testator's death. After several meetings it was decided that it would be easier and less complicated if the committee drafted a new statute that would allow transfer on death beneficiary designations for tangible personal property as is presently allowed for real estate, bank accounts, brokerage accounts, motor vehicles, watercraft and outboard motors. To that end, the EPTPL Section Council approved the statute that is follows this report. This proposed new legislation was subsequently presented to the Council of Delegates at its meeting on May 10, 2019, but failed to be approved by a vote of 40 against and 39 in favor. Our Committee subsequently reconvened to discuss the issues raised by members of the Council of Delegates.

The issues of concern with our proposed statute (which were raised at the Screening Committee as well as at the subsequent meeting of the Council of Delegates) are summarized as follows:

1. At the screening committee, some individuals raised concerns about the fact that our proposed statute does not include a statute of limitations for submitting the written instrument after the owner's death.

2. Members of the Council of Delegates raised an issue that there was no "custodian" provided in our proposed statute for the transfer on death beneficiary document which would result in litigation if the document was not found until after the estate was probated.

3. Members of the Council of Delegates also expressed concern that litigation might ensue if an owner gave away property to someone else after executing a beneficiary designation document.

The committee strongly feels that no statute of limitations is needed in our new statute for the simple reason that our proposed statute should be consistent with what is permitted regarding the admission of a subsequently discovered Will to probate. There is no statute of limitations which applies when a subsequent Will is found after a prior Will has been admitted to probate. If one can admit a more recently executed Will years later after an older Will has been probated and the estate distributed, should not the same hold true for a transfer on death beneficiary designation? In all practicality, anyone who has in his possession a TOD beneficiary designation for an item of tangible personal property is going to submit it to the appropriate party, most likely the person who has custody or control over the item, as soon as he is aware that the owner has died. There would be no rational reason why he would not want to do so unless the beneficiary did not want the item that the owner had designated him to receive. In addition, other state statutes which our proposed statute has been loosely based on do not provide for a statute of limitations for submitting a designation of beneficiary form to the appropriate party.

For similar reasons, the committee feels that there is no need to have a "custodian" for the transfer on death beneficiary form. There is no legal requirement that mandates that a Will has to be given to a "custodian" for safekeeping before the testator's death and, accordingly, there is no need for a TOD Beneficiary Designation to be held by a "custodian" for the owner or future beneficiary of the property. While in many cases it probably will be the lawyer who maintains the writing which provides a TOD Beneficiary Designation for tangible property, there is no compelling reason to require it.

Finally, the committee noted that someone can always give away property to someone else after executing a transfer on death beneficiary designation form just as a testator can give away assets during his lifetime even though he may have specifically bequeathed the same items in his Will. Our new proposed statute clearly states under R.C. § 2131.14(D) that a designation in beneficiary form has no effect on the ownership of the tangible personal property until the death of the present owner. There is no reason for our statute to be any different than what a testator can do.

After much discussion, the committee is of the opinion that our proposed new statute should be resubmitted to the Council of Delegates without making any further changes to the proposed statute than what was approved by the EPTPL Section in January, 2019.

For those new members of the Council of Delegates, the following is a brief summary of the major provisions of our proposed new statute:

R.C. § 2131.14, our proposed new statute, will follow R.C. § 2131.13 which permits the designation of motor vehicles, watercraft and outboard motors in beneficiary form.

Division (A) of our proposed statute provides the definitions for various terms used in the new statute. Division (B) of the statute provides the details for making a valid designation in beneficiary form for tangible personal property. Some highlights of our new proposed statute are as follows:

1. To be valid, a transfer on death beneficiary form must be in writing, be dated and executed by the present owner, and acknowledged before a Notary Public. R.C. § 2131.14 (B) (1) (5) and (6)

2. Under R.C. § 2131.14(A), a transfer on death beneficiary will include a class of persons specified in a designation in beneficiary form. Thus, the owner can simply designate his children to receive a tangible item after his death.

3. Under R.C. § 2131.14(A)(6), the statute defines a "transferring person" who would be the individual who delivers or conveys the tangible personal property to a transfer on death beneficiary.

4. R.C. § 2131.14(J), (K), (L), (M) and (O) are provisions designed to provide protection to the "transferring person" who takes it upon himself to transfer the property to the designated beneficiaries and to provide him with the opportunity to petition the Probate Court for instructions in the event a problem or issue develops. As a committee, we decided not to require that a transferring person be named by the owner to effectuate the transfer or delivery of the property but we wanted to fully protect whoever would take it upon himself to deliver the property to the intended transferee.

5. R.C. § 2131.14(N) terminates a transfer on death beneficiary designation to a former spouse of the owner when the divorce, dissolution of marriage or annulment of the marriage occurs after the designation of beneficiary form had been executed by the owner, similar to what we have done in Ohio with TOD deeds, death benefits, trust provisions, etc. which name former spouses as beneficiaries.

6. R.C. § 2131.14(F) and (H) allows an owner to name primary and contingent transfer on death beneficiaries and if no primary or contingent beneficiaries survive the owner, the property will have to be included in the deceased owner's probate estate.

The overriding concern and goal of the committee is to make it simple for an owner to designate a beneficiary or beneficiaries to receive various items of tangible personal property without having to go through a probate process. The members of this Committee who drafted the proposed new statute strongly believe that its enactment will provide another useful tool to the residents of Ohio for transferring items of tangible personal property in an efficient and

economical manner similar to what Ohio residents can now do with brokerage accounts, bank accounts, motor vehicles and real estate.

Text of the Proposal

R.C. 2131.14. Designation of Tangible Personal Property in Beneficiary Form.

(A) As used in this section:

(1) "Designate" or "designation in beneficiary form" means to designate, or the designation of, tangible personal property, with the intention to transfer ownership upon death of the present owner, to one or more persons as the transfer-on-death beneficiary or beneficiaries, who will become the owner or owners of the tangible personal property upon death of the present owner.

(2) "Beneficiary form" is shown by the words "transfer-on-death" or the abbreviation "TOD" after the item or items of tangible personal property and before the name of the transfer-on-death beneficiary or beneficiaries, or shown by any other words or statements to indicate intent to transfer ownership of tangible personal property upon the death of the present owner.

(3) "Person" or "persons" means an individual, a corporation, an organization, a trust or other legal entity.

(4) "Tangible personal property," for purposes of this section, shall mean objects that may be touched and moved (and animals) and shall include tangible personal property that is acquired after the execution of a designation in beneficiary form, but shall not include money other than coin collections or any registered or certificated tangible personal property, such as motor vehicles, watercrafts and outboard motors.

(5) "Transfer-on-death beneficiary" or "beneficiaries" means a person or persons, or class of persons, specified in a designation in beneficiary form who will become the owner or owners of the tangible personal property upon the death of the present owner. If a class of persons is named as the transfer-on-death beneficiary, only those members in the class who survive the death of the present owner shall receive an interest in the tangible personal property. Each surviving member in the class shall receive an equal interest in the tangible personal property being transferred unless otherwise specified in the designation in beneficiary form. A designation in beneficiary form that designates a class by description and not by naming the members of the class, such as, but not limited to, designating the children or descendants of the owner or another shall include all members of such class, whether born, adopted or existing before or after the beneficiary designation is made.

(6) "Transferring person" means any person who delivers or conveys tangible personal property to a transfer-on-death beneficiary or beneficiaries in accordance with a designation in beneficiary form which satisfies the requirements under Paragraph B.

(B) A designation in beneficiary form shall:

(1) Be in writing;

(2) Contain a general statement of disposition of all tangible personal property and/or describe the specific item or items of tangible personal property;

(3) Identify a specified part of the interest to be transferred, if less than the entire interest;

(4) Identify the name or class of the transfer-on-death beneficiary or beneficiaries in beneficiary form;

(5) Be dated; and

(6) Be executed by the present owner and acknowledged before a Notary Public.

(C) A designation in beneficiary form is not required to be supported by any consideration or be delivered to the transfer-on-death beneficiary or beneficiaries in order for the designation in beneficiary form to be effective.

(D) A designation in beneficiary form has no effect on the ownership of the tangible personal property until the death of the present owner. The present owner may revoke or change the designation in beneficiary form at any time without the consent of the transfer-on-death beneficiary or beneficiaries by a subsequently executed designation in beneficiary form or by a subsequently executed written instrument which is dated, executed by the present owner and acknowledged before a Notary Public.

(E) Upon the death of the present owner of tangible personal property designated in beneficiary form, the ownership of said tangible personal property shall pass to the transfer-on-death beneficiary or beneficiaries who survive the deceased owner or are in existence on the date of death of the deceased owner.

(F) A designation in beneficiary form may include primary and contingent transfer-on-death beneficiaries.

(G) If there are inconsistent designations in beneficiary form, the most recent designation in beneficiary form controls.

(H) If no primary or contingent transfer-on-death beneficiary or beneficiaries survive the deceased owner, the tangible personal property shall be included in the probate estate of the deceased owner.

(I) The beneficiary or beneficiaries of tangible personal property (pursuant to a designation in beneficiary form that was improperly distributed by a transferring person or otherwise) are

liable to return to the rightful beneficiary or beneficiaries the tangible personal property improperly received by the beneficiary or beneficiaries. If a beneficiary who improperly received the tangible personal property no longer has the property interest or has imposed an encumbrance on the tangible personal property improperly received, the beneficiary is liable to return the value of the property as of the date of disposition.

(J) The owner, in making provision for a non-probate transfer under the provisions of this statute, gives to any transferring person acting hereunder the protections provided in this section for executing the owner's beneficiary designation.

(K) A transferring person may rely and act on a certified or authenticated copy of a death certificate issued by an official or agency of the place where the death occurred as showing the fact, place, date, time of death and the identity of the decedent, or a certified or authenticated copy of a report or record of any governmental agency that a person is deceased.

(L) A transferring person shall have no duty:

(1) To give notice to any person of the date, manner and persons to whom transfer will be made under the beneficiary designation;

(2) To attempt to locate any beneficiary;

(3) To locate a trustee or custodian, obtain appointment of a successor trustee or custodian, or discover the existence of a trust instrument or will that creates an express trust; and

(4) To determine any fact or law that would cause the beneficiary designation to be revoked, in whole or in part, as to any person or that would qualify or disqualify any person to receive a share under the non-probate transfer, or that would vary the distribution provided in the beneficiary designation.

(M) In the event there is an issue or problem with respect to the transfer of the tangible personal property to the transfer-on-death beneficiary or beneficiaries, a transferring person will have the right to petition the Probate Court having jurisdiction with respect to the deceased owner's estate for instructions.

(N) If, after the execution of a designation of beneficiary form under which the present owner of the tangible personal property's spouse is designated the transfer on death beneficiary, the present owner of the tangible personal property and such present owner's spouse are divorced, obtain a dissolution of marriage or have the marriage annulled, then the designation of the present owner's spouse as a transfer on death beneficiary on such instrument shall be terminated and the spouse shall be deemed to have predeceased the present owner of the tangible personal property.

(O) A transfer by the transferring person (in accordance with the provisions of this statute and pursuant to the beneficiary designation, in good faith and in reliance on information the

transferring person reasonably believes to be accurate) discharges the transferring person from all claims and liability for the property transferred, regardless of any negligence in determining the proper transferees. The remedy of the rightful transferees of tangible personal property transferred under a designation in beneficiary form executed in conformities with this statute shall be limited to an action against the improper transferees.

(P) This section does not preclude other methods of transferring ownership of tangible personal property that are permitted by law and have the effect of postponing enjoyment of the tangible personal property until after the death of the present owner.

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REPORT OF FAMILY LAW COMMITTEE

The Family Law Committee respectfully requests your favorable consideration of the following general proposal:

> To amend R.C. § 3109.04 to restore the legal term "unsuitability" to ensure that the state cannot wrongfully remove a child from a suitable parent.

Respectfully submitted,

Eric W. Johnson, *Columbus*
Chair, Family Law Committee

Summary and Rationale for Proposal

In 1877, the Ohio Supreme Court held in *Clark v. Bayer* that parents who are *suitable* have a paramount right to the custody of their children unless they forfeit that right or become totally unable to care for their children.[2] This requirement of "inability" or "parental unsuitability" (i.e., that a parent must be deemed unsuitable before losing custody to a nonparent) became Ohio's standard for custody cases arising in both domestic relations and juvenile courts and was codified in 1893.[3] This standard remained for both courts until 1974 when the legislature amended domestic relations custody statute (ORC §3109.04). R.C. 3109.04(D)(2) now states:

> If the court finds, with respect to any child under eighteen years of age, that it is in the best interest of the child for neither parent to be designated the residential parent and legal custodian of the child, it may commit the child to a relative of the child or certify a copy of its findings, together with as much of the record and the further information, in narrative form or otherwise, that it considers necessary or as the juvenile court requests, to the juvenile court for further proceedings, and, upon the certification, the juvenile court has exclusive jurisdiction.

Where this statute previously explicitly required the unsuitability of a parent before that parent could lose custody to a third party, the legislature substituted a mere "best interest" test such that even suitable parents could lose custody of their child to a nonparent if the court determined this to be in the best interest of the child.[4] This change has caused significant problems.

Parents have heightened protections under the Due Process Clause of the Fourteenth Amendment to "establish a home and bring up children".[5] The United States Supreme Court

[2] *Clark v. Bayer,* 32 Ohio St. 299 (1877).
[3] *Thrasher v. Thrasher*, 3 Ohio App.3d 210, 213, 444 N.E.2d 431 (9th Dist.1981).
[4] Ohio Laws 135 v H 233 (1973-74).
[5] *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) recounting the liberty interests guaranteed by the Fourteenth

has repeatedly and emphatically upheld the primacy of this right as to suitable parents which is implicated in every custody battle between a parent and nonparent.[6] As such, the Court requires a finding of unsuitability before a parent may lose custody to a nonparent as a means of ensuring due process.[7]

The current statute, as written, is contrary to constitutional law—as decided repeatedly by the United States Supreme Court—and actual case law as handed down by Supreme Court of Ohio. Moreover, the current language has caused great confusion in the jurisprudence in Ohio child custody cases as to nonparent custody, and has caused great confusion regarding the actual legal standard a court must use to determine whether to grant custody to a nonparent in a private custody case. This can be easily remedied by amending the statute as written below.

Text of Proposal

3109.04 Allocating parental rights and responsibilities for care of children - shared parenting.

(A) In any divorce, legal separation, or annulment proceeding and in any proceeding pertaining to the allocation of parental rights and responsibilities for the care of a child, upon hearing the testimony of either or both parents and considering any mediation report filed pursuant to section 3109.052 of the Revised Code and in accordance with sections 3127.01 to 3127.53 of the Revised Code, the court shall allocate the parental rights and responsibilities for the care of the minor children of the marriage. Subject to division (D)(2) of this section, the court may allocate the parental rights and responsibilities for the care of the children in either of the following ways:

(1) If neither parent files a pleading or motion in accordance with division (G) of this section, if at least one parent files a pleading or motion under that division but no parent who filed a pleading or motion under that division also files a plan for shared parenting, or if at least one

Amendment: ("No State shall . . . deprive any person of life, liberty, or property, without due process of law." This right includes: "the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." "The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. ") .

[6] *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 147(2000)(Reiterating the "extensive precedent" upholding the proposition that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents concerning their children, and referencing the legal history: W*ashington* v. *Glucksberg,* 521 U. S. 702, 720(1997); *Pierce v. Society of Sisters*, 268 U. S. 510, 535 (192*5); Stanley v. Illinois*, 405 U. S. 645, 651 (1972); *Wisconsin v. Yoder*, 406 U. S. 205, 232 (1972); *Santosky v. Kramer*, 455 U. S. 745, 753 (1982); *Quilloin v. Walcott*, 434 U. S. 246, 255 (1978);*Parham v. J. R*., 442 U. S. 584, 602 (1979).

[7] *Stanley* v. *Illinois,* 405 U.S. 645 (1972*)*(Though an unwed father challenged automatically losing his children to the state upon the death of their mother under the Equal Protection Clause, the Court enforced Stanley's parental rights under the Due Process Clause. "The State's interest in caring for Stanley's children is *de minimis* if Stanley is shown to be a fit father. It insists on presuming rather than proving Stanley's unfitness solely because it is more convenient to presume than to prove. Under the Due Process Clause that advantage is insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family.").

parent files both a pleading or motion and a shared parenting plan under that division but no plan for shared parenting is in the best interest of the children, the court, in a manner consistent with the best interest of the children, shall allocate the parental rights and responsibilities for the care of the children primarily to one of the parents, designate that parent as the residential parent and the legal custodian of the child, and divide between the parents the other rights and responsibilities for the care of the children, including, but not limited to, the responsibility to provide support for the children and the right of the parent who is not the residential parent to have continuing contact with the children.

(2) If at least one parent files a pleading or motion in accordance with division (G) of this section and a plan for shared parenting pursuant to that division and if a plan for shared parenting is in the best interest of the children and is approved by the court in accordance with division (D)(1) of this section, the court may allocate the parental rights and responsibilities for the care of the children to both parents and issue a shared parenting order requiring the parents to share all or some of the aspects of the physical and legal care of the children in accordance with the approved plan for shared parenting. If the court issues a shared parenting order under this division and it is necessary for the purpose of receiving public assistance, the court shall designate which one of the parents' residences is to serve as the child's home. The child support obligations of the parents under a shared parenting order issued under this division shall be determined in accordance with Chapters 3119., 3121., 3123., and 3125. of the Revised Code.

(B)

(1) When making the allocation of the parental rights and responsibilities for the care of the children under this section in an original proceeding or in any proceeding for modification of a prior order of the court making the allocation, the court shall take into account that which would be in the best interest of the children. In determining the child's best interest for purposes of making its allocation of the parental rights and responsibilities for the care of the child and for purposes of resolving any issues related to the making of that allocation, the court, in its discretion, may and, upon the request of either party, shall interview in chambers any or all of the involved children regarding their wishes and concerns with respect to the allocation.

(2) If the court interviews any child pursuant to division (B)(1) of this section, all of the following apply:

(a) The court, in its discretion, may and, upon the motion of either parent, shall appoint a guardian ad litem for the child.

(b) The court first shall determine the reasoning ability of the child. If the court determines that the child does not have sufficient reasoning ability to express the child's wishes and concern with respect to the allocation of parental rights and responsibilities for the care of the child, it shall not determine the child's wishes and concerns with respect to the allocation. If the court determines that the child has sufficient reasoning ability to express the child's wishes or concerns with respect to the allocation, it then shall determine whether, because of

special circumstances, it would not be in the best interest of the child to determine the child's wishes and concerns with respect to the allocation. If the court determines that, because of special circumstances, it would not be in the best interest of the child to determine the child's wishes and concerns with respect to the allocation, it shall not determine the child's wishes and concerns with respect to the allocation and shall enter its written findings of fact and opinion in the journal. If the court determines that it would be in the best interests of the child to determine the child's wishes and concerns with respect to the allocation, it shall proceed to make that determination.

(c) The interview shall be conducted in chambers, and no person other than the child, the child's attorney, the judge, any necessary court personnel, and, in the judge's discretion, the attorney of each parent shall be permitted to be present in the chambers during the interview.

(3) No person shall obtain or attempt to obtain from a child a written or recorded statement or affidavit setting forth the child's wishes and concerns regarding the allocation of parental rights and responsibilities concerning the child. No court, in determining the child's best interest for purposes of making its allocation of the parental rights and responsibilities for the care of the child or for purposes of resolving any issues related to the making of that allocation, shall accept or consider a written or recorded statement or affidavit that purports to set forth the child's wishes and concerns regarding those matters.

(C) Prior to trial, the court may cause an investigation to be made as to the character, family relations, past conduct, earning ability, and financial worth of each parent and may order the parents and their minor children to submit to medical, psychological, and psychiatric examinations. The report of the investigation and examinations shall be made available to either parent or the parent's counsel of record not less than five days before trial, upon written request. The report shall be signed by the investigator, and the investigator shall be subject to cross-examination by either parent concerning the contents of the report. The court may tax as costs all or any part of the expenses for each investigation.

If the court determines that either parent previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being a neglected child, that either parent previously has been determined to be the perpetrator of the neglectful act that is the basis of an adjudication that a child is a neglected child, or that there is reason to believe that either parent has acted in a manner resulting in a child being a neglected child, the court shall consider that fact against naming that parent the residential parent and against granting a shared parenting decree. When the court allocates parental rights and responsibilities for the care of children or determines whether to grant shared parenting in any proceeding, it shall consider whether either parent or any member of the household of either parent has been convicted of or pleaded guilty to a violation of section 2919.25 of the Revised Code or a sexually oriented offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the proceeding, has been convicted of or pleaded guilty to any sexually oriented offense or other offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the proceeding and caused physical harm to the victim in the commission of the offense, or has been determined to be the perpetrator of the abusive act

that is the basis of an adjudication that a child is an abused child. If the court determines that either parent has been convicted of or pleaded guilty to a violation of section 2919.25 of the Revised Code or a sexually oriented offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the proceeding, has been convicted of or pleaded guilty to any sexually oriented offense or other offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the proceeding and caused physical harm to the victim in the commission of the offense, or has been determined to be the perpetrator of the abusive act that is the basis of an adjudication that a child is an abused child, it may designate that parent as the residential parent and may issue a shared parenting decree or order only if it determines that it is in the best interest of the child to name that parent the residential parent or to issue a shared parenting decree or order and it makes specific written findings of fact to support its determination.

(D)

(1)

(a) Upon the filing of a pleading or motion by either parent or both parents, in accordance with division (G) of this section, requesting shared parenting and the filing of a shared parenting plan in accordance with that division, the court shall comply with division (D)(1)(a)(i), (ii), or (iii) of this section, whichever is applicable:

(i) If both parents jointly make the request in their pleadings or jointly file the motion and also jointly file the plan, the court shall review the parents' plan to determine if it is in the best interest of the children. If the court determines that the plan is in the best interest of the children, the court shall approve it. If the court determines that the plan or any part of the plan is not in the best interest of the children, the court shall require the parents to make appropriate changes to the plan to meet the court's objections to it. If changes to the plan are made to meet the court's objections, and if the new plan is in the best interest of the children, the court shall approve the plan. If changes to the plan are not made to meet the court's objections, or if the parents attempt to make changes to the plan to meet the court's objections, but the court determines that the new plan or any part of the new plan still is not in the best interest of the children, the court may reject the portion of the parents' pleadings or deny their motion requesting shared parenting of the children and proceed as if the request in the pleadings or the motion had not been made. The court shall not approve a plan under this division unless it determines that the plan is in the best interest of the children.

(ii) If each parent makes a request in the parent's pleadings or files a motion and each also files a separate plan, the court shall review each plan filed to determine if either is in the best interest of the children. If the court determines that one of the filed plans is in the best interest of the children, the court may approve the plan. If the court determines that neither filed plan is in the best interest of the children, the court may order each parent to submit appropriate changes to the parent's plan or both of the filed plans to meet the court's objections, or may select one of the filed plans and order each parent to submit appropriate changes to the selected plan to meet the court's objections. If changes to the plan or plans are

submitted to meet the court's objections, and if any of the filed plans with the changes is in the best interest of the children, the court may approve the plan with the changes. If changes to the plan or plans are not submitted to meet the court's objections, or if the parents submit changes to the plan or plans to meet the court's objections but the court determines that none of the filed plans with the submitted changes is in the best interest of the children, the court may reject the portion of the parents' pleadings or deny their motions requesting shared parenting of the children and proceed as if the requests in the pleadings or the motions had not been made. If the court approves a plan under this division, either as originally filed or with submitted changes, or if the court rejects the portion of the parents' pleadings or denies their motions requesting shared parenting under this division and proceeds as if the requests in the pleadings or the motions had not been made, the court shall enter in the record of the case findings of fact and conclusions of law as to the reasons for the approval or the rejection or denial. Division (D)(1)(b) of this section applies in relation to the approval or disapproval of a plan under this division.

(iii) If each parent makes a request in the parent's pleadings or files a motion but only one parent files a plan, or if only one parent makes a request in the parent's pleadings or files a motion and also files a plan, the court in the best interest of the children may order the other parent to file a plan for shared parenting in accordance with division (G) of this section. The court shall review each plan filed to determine if any plan is in the best interest of the children. If the court determines that one of the filed plans is in the best interest of the children, the court may approve the plan. If the court determines that no filed plan is in the best interest of the children, the court may order each parent to submit appropriate changes to the parent's plan or both of the filed plans to meet the court's objections or may select one filed plan and order each parent to submit appropriate changes to the selected plan to meet the court's objections. If changes to the plan or plans are submitted to meet the court's objections, and if any of the filed plans with the changes is in the best interest of the children, the court may approve the plan with the changes. If changes to the plan or plans are not submitted to meet the court's objections, or if the parents submit changes to the plan or plans to meet the court's objections but the court determines that none of the filed plans with the submitted changes is in the best interest of the children, the court may reject the portion of the parents' pleadings or deny the parents' motion or reject the portion of the parents' pleadings or deny their motions requesting shared parenting of the children and proceed as if the request or requests or the motion or motions had not been made. If the court approves a plan under this division, either as originally filed or with submitted changes, or if the court rejects the portion of the pleadings or denies the motion or motions requesting shared parenting under this division and proceeds as if the request or requests or the motion or motions had not been made, the court shall enter in the record of the case findings of fact and conclusions of law as to the reasons for the approval or the rejection or denial. Division (D)(1)(b) of this section applies in relation to the approval or disapproval of a plan under this division.

(b) The approval of a plan under division (D)(1)(a)(ii) or (iii) of this section is discretionary with the court. The court shall not approve more than one plan under either division and shall not approve a plan under either division unless it determines that the plan is in the best interest of the children. If the court, under either division, does not determine that any filed

plan or any filed plan with submitted changes is in the best interest of the children, the court shall not approve any plan.

(c) Whenever possible, the court shall require that a shared parenting plan approved under division (D)(1)(a)(i), (ii), or (iii) of this section ensure the opportunity for both parents to have frequent and continuing contact with the child, unless frequent and continuing contact with any parent would not be in the best interest of the child.

(d) If a court approves a shared parenting plan under division (D)(1)(a)(i), (ii), or (iii) of this section, the approved plan shall be incorporated into a final shared parenting decree granting the parents the shared parenting of the children. Any final shared parenting decree shall be issued at the same time as and shall be appended to the final decree of dissolution, divorce, annulment, or legal separation arising out of the action out of which the question of the allocation of parental rights and responsibilities for the care of the children arose.

No provisional shared parenting decree shall be issued in relation to any shared parenting plan approved under division (D)(1)(a)(i), (ii), or (iii) of this section. A final shared parenting decree issued under this division has immediate effect as a final decree on the date of its issuance, subject to modification or termination as authorized by this section.

(2) Only ~~I~~if the court finds, with respect to any child under eighteen years of age, that ~~it is in the best interest of the child for~~ neither parent is suitable to be designated the residential parent and legal custodian of the child, it may then make an original award of custody of the child to a nonparent upon determining that it would in the best interest of that child for the nonparent to have legal custody. In the alternative, the court may then certify the matter to the juvenile court for further proceedings, and, ~~commit the child to a relative of the child or certify a copy of its findings, together with as much of the record and the further information, in narrative form or otherwise, that it considers necessary or as the juvenile court requests, to the juvenile court for further proceedings, and,~~ upon the certification, the juvenile court has exclusive jurisdiction. A court may find a parent to be unsuitable only if the preponderance of the evidence demonstrates that the parent abandoned the child; contractually relinquished custody of the child; has become totally incapable of supporting or caring for the child; or that an award of custody to the parent would be detrimental to the child.

(E)

(1)

(a) The court shall not modify a prior decree allocating parental rights and responsibilities for the care of children unless it finds, based on facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child, the child's residential parent, or either of the parents subject to a shared parenting decree, and that the modification is necessary to serve the best interest of the child. In applying these standards, the court shall retain the residential parent designated by the prior decree or the prior shared parenting decree, unless a modification is in the best interest of the child and one of the following applies:

(i) The residential parent agrees to a change in the residential parent or both parents under a shared parenting decree agree to a change in the designation of residential parent.

(ii) The child, with the consent of the residential parent or of both parents under a shared parenting decree, has been integrated into the family of the person seeking to become the residential parent.

(iii) The harm likely to be caused by a change of environment is outweighed by the advantages of the change of environment to the child.

(b) One or both of the parents under a prior decree allocating parental rights and responsibilities for the care of children that is not a shared parenting decree may file a motion requesting that the prior decree be modified to give both parents shared rights and responsibilities for the care of the children. The motion shall include both a request for modification of the prior decree and a request for a shared parenting order that complies with division (G) of this section. Upon the filing of the motion, if the court determines that a modification of the prior decree is authorized under division (E)(1)(a) of this section, the court may modify the prior decree to grant a shared parenting order, provided that the court shall not modify the prior decree to grant a shared parenting order unless the court complies with divisions (A) and (D)(1) of this section and, in accordance with those divisions, approves the submitted shared parenting plan and determines that shared parenting would be in the best interest of the children.

(2) In addition to a modification authorized under division (E)(1) of this section:

(a) Both parents under a shared parenting decree jointly may modify the terms of the plan for shared parenting approved by the court and incorporated by it into the shared parenting decree. Modifications under this division may be made at any time. The modifications to the plan shall be filed jointly by both parents with the court, and the court shall include them in the plan, unless they are not in the best interest of the children. If the modifications are not in the best interests of the children, the court, in its discretion, may reject the modifications or make modifications to the proposed modifications or the plan that are in the best interest of the children. Modifications jointly submitted by both parents under a shared parenting decree shall be effective, either as originally filed or as modified by the court, upon their inclusion by the court in the plan. Modifications to the plan made by the court shall be effective upon their inclusion by the court in the plan.

(b) The court may modify the terms of the plan for shared parenting approved by the court and incorporated by it into the shared parenting decree upon its own motion at any time if the court determines that the modifications are in the best interest of the children or upon the request of one or both of the parents under the decree. Modifications under this division may be made at any time. The court shall not make any modification to the plan under this division, unless the modification is in the best interest of the children.

(c) The court may terminate a prior final shared parenting decree that includes a shared parenting plan approved under division (D)(1)(a)(i) of this section upon the request of one or both of the parents or whenever it determines that shared parenting is not in the best interest of the children. The court may terminate a prior final shared parenting decree that includes a shared parenting plan approved under division (D)(1)(a)(ii) or (iii) of this section if it determines, upon its own motion or upon the request of one or both parents, that shared parenting is not in the best interest of the children. If modification of the terms of the plan for shared parenting approved by the court and incorporated by it into the final shared parenting decree is attempted under division (E)(2)(a) of this section and the court rejects the modifications, it may terminate the final shared parenting decree if it determines that shared parenting is not in the best interest of the children.

(d) Upon the termination of a prior final shared parenting decree under division (E)(2)(c) of this section, the court shall proceed and issue a modified decree for the allocation of parental rights and responsibilities for the care of the children under the standards applicable under divisions (A), (B), and (C) of this section as if no decree for shared parenting had been granted and as if no request for shared parenting ever had been made.

(F)

(1) In determining the best interest of a child pursuant to this section, whether on an original decree allocating parental rights and responsibilities for the care of children or a modification of a decree allocating those rights and responsibilities, the court shall consider all relevant factors, including, but not limited to:

(a) The wishes of the child's parents regarding the child's care;

(b) If the court has interviewed the child in chambers pursuant to division (B) of this section regarding the child's wishes and concerns as to the allocation of parental rights and responsibilities concerning the child, the wishes and concerns of the child, as expressed to the court;

(c) The child's interaction and interrelationship with the child's parents, siblings, and any other person who may significantly affect the child's best interest;

(d) The child's adjustment to the child's home, school, and community;

(e) The mental and physical health of all persons involved in the situation;

(f) The parent more likely to honor and facilitate court-approved parenting time rights or visitation and companionship rights;

(g) Whether either parent has failed to make all child support payments, including all arrearages, that are required of that parent pursuant to a child support order under which that parent is an obligor;

(h) Whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child; whether either parent, in a case in which a child has been adjudicated an abused child or a neglected child, previously has been determined to be the perpetrator of the abusive or neglectful act that is the basis of an adjudication; whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to a violation of section 2919.25 of the Revised Code or a sexually oriented offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding; whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to any offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding and caused physical harm to the victim in the commission of the offense; and whether there is reason to believe that either parent has acted in a manner resulting in a child being an abused child or a neglected child;

(i) Whether the residential parent or one of the parents subject to a shared parenting decree has continuously and willfully denied the other parent's right to parenting time in accordance with an order of the court;

(j) Whether either parent has established a residence, or is planning to establish a residence, outside this state.

(2) In determining whether shared parenting is in the best interest of the children, the court shall consider all relevant factors, including, but not limited to, the factors enumerated in division (F)(1) of this section, the factors enumerated in section 3119.23 of the Revised Code, and all of the following factors:

(a) The ability of the parents to cooperate and make decisions jointly, with respect to the children;

(b) The ability of each parent to encourage the sharing of love, affection, and contact between the child and the other parent;

(c) Any history of, or potential for, child abuse, spouse abuse, other domestic violence, or parental kidnapping by either parent;

(d) The geographic proximity of the parents to each other, as the proximity relates to the practical considerations of shared parenting;

(e) The recommendation of the guardian ad litem of the child, if the child has a guardian ad litem.

(3) When allocating parental rights and responsibilities for the care of children, the court shall not give preference to a parent because of that parent's financial status or condition.

(G) Either parent or both parents of any children may file a pleading or motion with the court requesting the court to grant both parents shared parental rights and responsibilities for the care of the children in a proceeding held pursuant to division (A) of this section. If a pleading or motion requesting shared parenting is filed, the parent or parents filing the pleading or motion also shall file with the court a plan for the exercise of shared parenting by both parents. If each parent files a pleading or motion requesting shared parenting but only one parent files a plan or if only one parent files a pleading or motion requesting shared parenting and also files a plan, the other parent as ordered by the court shall file with the court a plan for the exercise of shared parenting by both parents. The plan for shared parenting shall be filed with the petition for dissolution of marriage, if the question of parental rights and responsibilities for the care of the children arises out of an action for dissolution of marriage, or, in other cases, at a time at least thirty days prior to the hearing on the issue of the parental rights and responsibilities for the care of the children. A plan for shared parenting shall include provisions covering all factors that are relevant to the care of the children, including, but not limited to, provisions covering factors such as physical living arrangements, child support obligations, provision for the children's medical and dental care, school placement, and the parent with which the children will be physically located during legal holidays, school holidays, and other days of special importance.

(H) If an appeal is taken from a decision of a court that grants or modifies a decree allocating parental rights and responsibilities for the care of children, the court of appeals shall give the case calendar priority and handle it expeditiously.

(I)

(1) Upon receipt of an order for active military service in the uniformed services, a parent who is subject to an order allocating parental rights and responsibilities or in relation to whom an action to allocate parental rights and responsibilities is pending and who is ordered for active military service shall notify the other parent who is subject to the order or in relation to whom the case is pending of the order for active military service within three days of receiving the military service order.

(2) On receipt of the notice described in division (I)(1) of this section, either parent may apply to the court for a hearing to expedite an allocation or modification proceeding so that the court can issue an order before the parent's active military service begins. The application shall include the date on which the active military service begins.

The court shall schedule a hearing upon receipt of the application and hold the hearing not later than thirty days after receipt of the application, except that the court shall give the case calendar priority and handle the case expeditiously if exigent circumstances exist in the case.

The court shall not modify a prior decree allocating parental rights and responsibilities unless the court determines that there has been a change in circumstances of the child, the child's residential parent, or either of the parents subject to a shared parenting decree, and that modification is necessary to serve the best interest of the child. The court shall not find past, present, or possible future active military service in the uniformed services to constitute a

change in circumstances justifying modification of a prior decree pursuant to division (E) of this section. The court shall make specific written findings of fact to support any modification under this division.

(3) Nothing in division (I) of this section shall prevent a court from issuing a temporary order allocating or modifying parental rights and responsibilities for the duration of the parent's active military service. A temporary order shall specify whether the parent's active military service is the basis of the order and shall provide for termination of the temporary order and resumption of the prior order within ten days after receipt of notice pursuant to division (I)(5) of this section, unless the other parent demonstrates that resumption of the prior order is not in the child's best interest.

(4) At the request of a parent who is ordered for active military service in the uniformed services and who is a subject of a proceeding pertaining to a temporary order for the allocation or modification of parental rights and responsibilities, the court shall permit the parent to participate in the proceeding and present evidence by electronic means, including communication by telephone, video, or internet to the extent permitted by the rules of the supreme court of Ohio.

(5) A parent who is ordered for active military service in the uniformed services and who is a subject of a proceeding pertaining to the allocation or modification of parental rights and responsibilities shall provide written notice to the court, child support enforcement agency, and the other parent of the date of termination of the parent's active military service not later than thirty days after the date on which the service ends.

(J) As used in this section:

(1) "Abused child" has the same meaning as in section 2151.031 of the Revised Code.

(2) "Active military service" means service by a member of the uniformed services in compliance with military orders to report for combat operations, contingency operations, peacekeeping operations, a remote tour of duty, or other active service for which the member is required to report unaccompanied by any family member, including any period of illness, recovery from injury, leave, or other lawful absence during that operation, duty, or service.

(3) "Neglected child" has the same meaning as in section 2151.03 of the Revised Code.

(4) "Sexually oriented offense" has the same meaning as in section 2950.01 of the Revised Code.

(5) "Uniformed services" means the United States armed forces, the army national guard, and the air national guard or any reserve component thereof, or the commissioned corps of the United States public health service.

(K) As used in the Revised Code, "shared parenting" means that the parents share, in the manner set forth in the plan for shared parenting that is approved by the court under division

(D)(1) and described in division (L)(6) of this section, all or some of the aspects of physical and legal care of their children.

(L) For purposes of the Revised Code:

(1) A parent who is granted the care, custody, and control of a child under an order that was issued pursuant to this section prior to April 11, 1991, and that does not provide for shared parenting has "custody of the child" and "care, custody, and control of the child" under the order, and is the "residential parent," the "residential parent and legal custodian," or the "custodial parent" of the child under the order.

(2) A parent who primarily is allocated the parental rights and responsibilities for the care of a child and who is designated as the residential parent and legal custodian of the child under an order that is issued pursuant to this section on or after April 11, 1991, and that does not provide for shared parenting has "custody of the child" and "care, custody, and control of the child" under the order, and is the "residential parent," the "residential parent and legal custodian," or the "custodial parent" of the child under the order.

(3) A parent who is not granted custody of a child under an order that was issued pursuant to this section prior to April 11, 1991, and that does not provide for shared parenting is the "parent who is not the residential parent," the "parent who is not the residential parent and legal custodian," or the "noncustodial parent" of the child under the order.

(4) A parent who is not primarily allocated the parental rights and responsibilities for the care of a child and who is not designated as the residential parent and legal custodian of the child under an order that is issued pursuant to this section on or after April 11, 1991, and that does not provide for shared parenting is the "parent who is not the residential parent," the "parent who is not the residential parent and legal custodian," or the "noncustodial parent" of the child under the order.

(5) Unless the context clearly requires otherwise, if an order is issued by a court pursuant to this section and the order provides for shared parenting of a child, both parents have "custody of the child" or "care, custody, and control of the child" under the order, to the extent and in the manner specified in the order.

(6) Unless the context clearly requires otherwise and except as otherwise provided in the order, if an order is issued by a court pursuant to this section and the order provides for shared parenting of a child, each parent, regardless of where the child is physically located or with whom the child is residing at a particular point in time, as specified in the order, is the "residential parent," the "residential parent and legal custodian," or the "custodial parent" of the child.

(7) Unless the context clearly requires otherwise and except as otherwise provided in the order, a designation in the order of a parent as the residential parent for the purpose of determining the school the child attends, as the custodial parent for purposes of claiming the child as a dependent pursuant to section 152(e) of the "Internal Revenue Code of 1986," 100

Stat. 2085, 26 U.S.C.A. 1, as amended, or as the residential parent for purposes of receiving public assistance pursuant to division (A)(2) of this section, does not affect the designation pursuant to division (L)(6) of this section of each parent as the "residential parent," the "residential parent and legal custodian," or the "custodial parent" of the child.

(M) The court shall require each parent of a child to file an affidavit attesting as to whether the parent, and the members of the parent's household, have been convicted of or pleaded guilty to any of the offenses identified in divisions (C) and (F)(1)(h) of this section.

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REPORT OF THE JUVENILE LAW COMMITTEE

To the Council of Delegates

The Juvenile Law Committee respectfully requests your favorable consideration of the following proposal:

To recommend and seek implementation of the substance of the rule change to require that all children in delinquency and status offense cases be appointed counsel at the earliest stage of proceedings, including addressing the practical problems of implementation—lack of funding and availability of qualified counsel to take juvenile cases.

Respectfully submitted,

Charlyn E. Bohland, *Columbus*
Chair, Juvenile Law Committee

Summary and Rationale for Proposal

Throughout 2019, the Juvenile Law Committee participated in a working group to weigh in on proposed changes to Juvenile Rule 3.

The changes were intended to bring Juvenile Rule 3 in line with *In re Gault*, the underlying facts of which was based on a misdemeanor offense. The changes to the rule would require appointed counsel at the earliest stage of the proceedings and require consultation with counsel prior to waiver for misdemeanors and status offense cases.

A detailed proposal from the Juvenile Rule 3 working group and support letters from several organizations were submitted to the Supreme Court rules committee. The proposal identified practical challenges and provided potential solutions, citing examples from diverse counties around the state. The proposal and changes to the rule follow.

The changes to Juvenile Rule 3 and a number of other rules were opened to a public comment period that ended on November 6th. OSBA supported the changes to Juvenile Rule 3.

After the public comment period ended, the rule was removed from further consideration. Juvenile Rule 3 was the only rule that was pulled entirely from consideration, while others were further amended and reissued for public comment.

There were favorable public comments highlighting the importance of the constitutional right to counsel, the vast body of research that demonstrates that lower-level cases are the entry points into the juvenile system, impacts of long-term collateral sanctions, and also proposed some creative solutions to address lack of funding and availability of counsel.

There were also public comments opposed to a rule change. The sum of those comments focused on 4 key aspects: 1) lack of funding and availability of qualified counsel to take

juvenile cases; 2) counsel is not needed and would bring very little to the child's case in those types of cases, and could potentially elongate resolution; 3) counsel invades the parent and child relationship; and 4) judges are in the best positions to use discretion to determine if counsel is needed or to accept a waiver. As a bar organization, OSBA is well-suited to address the substance of these concerns and ensure that children are afforded counsel.

Therefore, the Juvenile Law Committee is proposing the following to the Council of Delegates:

The Ohio State Bar Association is authorized to work with the Supreme Court of Ohio, the state legislature, and other interested parties to recommend and seek implementation of the substance of the rule change, including addressing the practical problems of implementation—lack of funding and availability of qualified counsel to take juvenile cases.

Text of Proposal

OHIO RULES OF JUVENILE PROCEDURE

RULE 3. Waiver of Rights

(A) All children in delinquency and status offense cases shall be appointed counsel at the earliest stage of the proceedings, so that the child has a meaningful opportunity to consult with counsel prior to any hearings.

(B) The court shall not allow any waiver of counsel unless the child has met privately with appointed or retained counsel to discuss the child's right to counsel and the disadvantages of self-representation.

(C) A child's right to be represented by counsel may not be waived in the following circumstances:

(1) When a child is detained pending adjudication;

(2) At a hearing conducted pursuant to Juv.R. 30;

~~(2)~~(3) When a serious youthful offender dispositional sentence has been requested; or

~~(3)~~(4) When there is a conflict or disagreement between the child and the parent, guardian, or custodian; or if the parent, guardian, or custodian requests that the child be removed from the home.

~~(B) If a child is facing the potential loss of liberty, the child shall be informed on the record of the child's right to counsel and the disadvantages of self-representation.~~

~~(C) If a child is charged with a felony offense, the court shall not allow any waiver of counsel unless the child has met privately with an attorney to discuss the child's right to counsel and the disadvantages of self-representation.~~

(D) In all other cases, ~~Any~~ any waiver of the right to counsel shall be made, only by the child, in open court, recorded, in the presence of the child's lawyer, and in writing. The court shall advise the child of the right to counsel and the dangers of self-representation. In determining whether a child has knowingly, intelligently, and voluntarily waived the right to counsel, the court shall look to the totality of the circumstances including, but not limited to: the child's age; intelligence; education; background and experience generally and in the court system specifically; the child's emotional stability; and the complexity of the proceedings. The Court shall ensure that a child consults with a parent, ~~custodian,~~ guardian, or guardian ad litem, before any waiver of counsel. ~~However, no parent, guardian, custodian, or other person may waive the child's right to counsel.~~

(E) A child is presumed indigent and thus entitled to the appointment of counsel at state expense without regard to the income of the child's parent, guardian or custodian.

(F) Other rights of a child may be waived with permission of the court.

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REPORT OF THE MILITARY AND VETERANS' AFFAIRS COMMITTEE

To the Council of Delegates:

The Military and Veterans' Affairs Committee respectfully requests your favorable consideration of the following proposal:

> To request that the Chief Justice of the Supreme Court of Ohio start collecting data regarding Ohio attorneys who are serving or who have served in the Armed Forces, National Guard, and Reserves (collectively, active duty or veterans), which will require an amendment to Section 4 of Rule VI, "Registration of attorneys" of the Supreme Court Rules for the Government of the Bar of Ohio.

Respectfully submitted,

Judge Michael E. Jackson, *Cleveland*
Chair, Military and Veterans' Affairs Committee

Summary and Rationale of Proposal

Active duty military and veterans have earned a special place in our communities and our nation. We recognize and appreciate that they spend a period of their lives protecting us. We have also learned there is a real and human cost active duty military and veterans, as well as their families, bear for their service. Quite properly, we have developed numerous programs and legal protections for their benefit. Remarkably, and because of that military culture, many veterans continue "to serve after service" by participating in or supporting numerous community activities, including helping other veterans.

Collecting data concerning these attorneys will enable the Supreme Court of Ohio to develop ways to further involve these lawyers for the betterment of legal community and the citizens of Ohio. Subject to the Council's approval and comment, the following draft letter to the Chief Justice suggests numerous ways we can better engage Ohio attorneys who are on active duty or veterans.

Presently and by way of background, our Committee with the assistance of the OSBA staff has identified the names and contact information each of our 214 in-state Committee members located in the 18 OSBA districts. The attached Ohio map shows by OSBA District the number of Committee members in that district (Attachment A). For example, Franklin County, OSBA District 7, has by far the largest concentration of Committee members, 37% (80 members). Collectively, District 7 and OSBA Districts 1 and 12 comprise 64% (139 members): District 1 (Hamilton, Butler, Warren, Claremont, and Clinton) has 33 members, and District 12 (Cuyahoga) has 26 members. All OSBA Districts have at least one member on our Committee.

Text of Proposal

Draft Letter to Chief Justice Maureen O'Connor

Chief Justice Maureen O'Connor
Supreme Court of Ohio
65 South Front Street
Columbus, Ohio 43215-3431

Dear Chief Justice O'Connor:

This letter is in response to your September 19, 2019 letter to retired Judge Michael Jackson. This letter also declares the Ohio State Bar Association' s (OSBA) support for the collection of data regarding Ohio attorneys who are or have served in our Armed Forces, National Guard, and Reserves.

You asked how the Supreme Court of Ohio can better engage with Ohio attorneys who are current or former military service members (collectively, service members and veterans). You also requested specific ideas on how the Supreme Court of Ohio could use the data from the "Registration of Attorneys Form" regarding an attorney's military service that was discussed in retired Judge Jackson's August 22, 2019 letter.

This letter provides you with the initial thoughts of the (OSBA), including the thoughts of Military and Veterans' Affairs Committee (Committee) of the OSBA, chaired by retired Judge Jackson.

By way of background, our Committee, with the assistance of the OSBA staff, has identified the names and contact information each of our 214 in-state Committee members located in the 18 OSBA districts. The attached Ohio map shows by OSBA District the number of Committee members in that district. For example, Franklin County, OSBA District 7, has by far the largest concentration of Committee members, 37% (80 members). Collectively, District 7, and Districts 1 and 12 have 64% (139 members); District 1 (Hamilton, Butler, Warren, Claremont, and Clinton) has 33 members, and District 12 (Cuyahoga) has 26 members. All OSBA Districts have at least one member on our Committee.

The ideas that follow are based on the concept of "service after service," meaning those service members and veterans who participate in or support community activities or public service, including helping other veterans while in the service or as a veteran. Based on the assumption that a service member or veteran attorney will provide legal services pro bono or for a reduced fee, our initial thoughts and ideas are:

• On site legal services at the Veterans Administration, including its Medical Facilities, focusing on, for example, guardianship issues with the VA concerning health and financial matters.

• Acting as "silent partners" to provide advice about military and VA regulations and requirements to attorneys who are representing service members or veterans with the goal of avoiding that decisions that have unintended consequences. For example, pleading to a low level crime that may preclude a future deployment or cause a termination of service.

• Increased participation in the present and future Mentor programs, which are key to the ongoing success of the existing and future Ohio Veterans Treatment Courts.

• Increased participation in the Legal Aid offices that provide legal assistance to veterans (including the proposed acceptance of the cases from Operation Legal Help Ohio.

• Increased participation in existing or to be developed speaking bureaus regarding the numerous topics/issues affecting service members and veterans, including such issues as Post Traumatic Stress Disorder (PTSD) and Traumatic Brain Injury (TMI).

• Increased participation concerning veterans with legal matters who are in nursing and assisted living facilities.

• Increased participation in existing prison veteran's programs, including reentry programs.

• Participation in the nationwide LexisNexis Pro Bono Task Force to provide discharge upgrades.

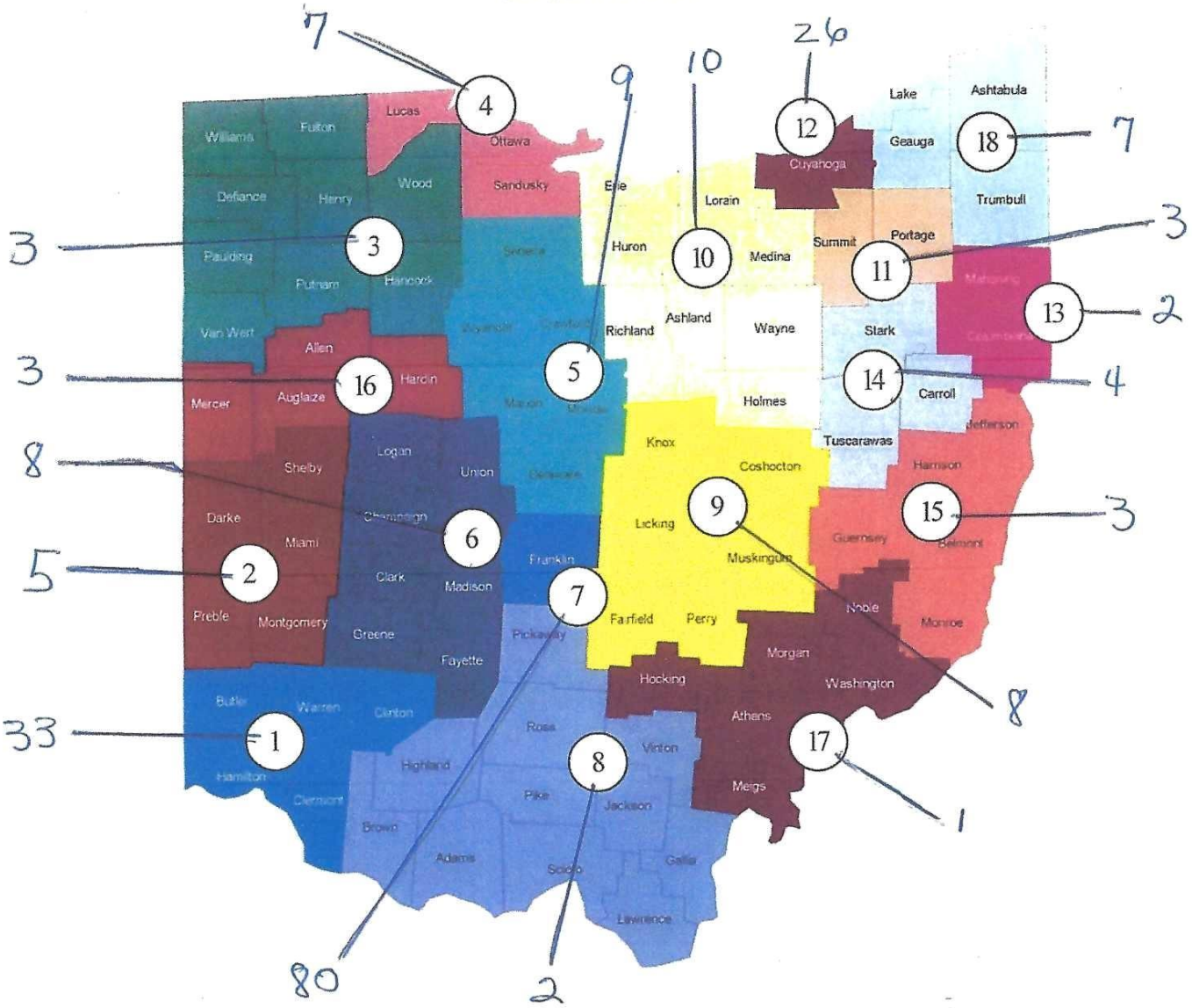
The data gained by having attorneys indicate their military service on the Supreme Court of Ohio's "Registration of Attorneys Form" will dramatically increase the Supreme Court of Ohio's ability to contact these attorneys, so that they will have the opportunity participate in community activities and public service, such as those suggested in this a letter.

[Signed by the appropriate OSBA representative]

Attachment A

Ohio State Bar Association

Districts



Prepared by Jeffrey Fortkamp, Ohio Legal Assistance Foundation, 2004

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REPORT OF THE NEGLIGENCE LAW COMMITTEE

To the Council of Delegates

The Negligence Law Committee respectfully requests your favorable consideration of the following proposal:

> To amend section 2125.02 to establish a requirement that "other next of kin" shall present a claim of damages and to eliminate the notice requirement of Sup. R.70 (B) to such "other next of kin" who fail to do so.

Respectfully submitted,

David B. Beck, *Portsmouth*
Chair, Negligence Law Committee

Rationale for Proposal

When a claim for wrongful death is presented to probate court for approval, the Ohio Rules of Civil Procedure and the Ohio Rules of Superintendence, along with local probate rules set forth notice requirements. However, who should receive the notice still remains unclear among most practitioners.

Section 2125.02 defines two classes of parties damaged by the wrongful death of the decedent- the first class being the surviving spouse, children and parents of the decedent, all of whom are rebuttably presumed to have suffered damages by reason of the wrongful death and the second class being "other next of kin" of the decedent. The term "other next of kin" is not defined in the statute and thus, the "other next of kin" provision of 2125.02 is subject to wide and varying interpretations among the 88 Probate Courts. Accordingly, difficulties arise for practitioners during the settlement approval process in applying the notice requirements under Sup.R.70 (B) with respect to "other next of kin". Although various courts have attempted to clarify this statute by way of case law, there is no uniformity as to the application of the notice requirements among the various Probate Courts in Ohio and the matter has not been addressed by the Ohio Supreme Court. (See attachment B). Currently, the requirements for notifying the "other next of kin" depend heavily on local practice and/or local probate court rule, if any. Practitioners are often failing to notice the proper "other next of kin" or are unnecessarily noticing a larger group of "other next of kin" than needed. This uncertain notice requirement is often tedious, expensive and unnecessarily delays the approval process of the claim and exposes attorneys to potential malpractice claims.

The purpose of this proposal is to eliminate confusion as to the application of the notice requirements to the Wrongful Death statute and to rectify inconsistent practices. This is a proposal to establish a requirement that "other next of kin" shall present a claim of damages and to eliminate the notice requirement to such "other next of kin" who fail to do so. By eliminating the notice requirement to such "other next kin" who fail to present a claim under

the proposed amendment, attorneys can more efficiently obtain settlement approvals and prevent potential malpractice claims.

Modeling this proposal after the duty to present claims found in the creditor statute (2117), the proposed change would, in general, require the "other next of kin" class to present their claim for damages to the probate court within one year of the decedent's date of death. Any claim not presented within that one year period would be forever barred and thus, such "other next of kin" would not be entitled to notice of the settlement hearing.

Text of the Proposal

2125.02 Parties - damages.

(A) (1) Except as provided in this division, a civil action for wrongful death shall be brought in the name of the personal representative of the decedent for the exclusive benefit of the surviving spouse, the children, and the parents of the decedent, all of whom are rebuttably presumed to have suffered damages by reason of the wrongful death, and for the exclusive benefit of the other next of kin of the decedent who present a claim for damages as set forth in 2125.02 (A) (1) (a),(b),(c),(d) and (e). A parent who abandoned a minor child who is the decedent shall not receive a benefit in a civil action for wrongful death brought under this division.

(a) When the decedent is survived by any of the following: a surviving spouse, any child, or either parent, all "other next of kin" of the decedent who have suffered damages by reason of the wrongful death shall present their claim for damages after the appointment of an executor or administrator, in writing, to the probate court by filing a written notice of claim with the probate court, including the claimant's name, address and telephone number and relation to the decedent.

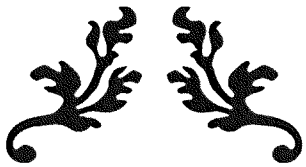
(b) Except as provided in section (A) (1) (c) of this division, a claim of any "other next of kin" for damages suffered by reason of the wrongful death that is not presented within one year after the date of death of the decedent shall be forever barred and such other next of kin shall not be considered an interested person entitled to notice of hearing pursuant to Sup. R. 70 (B).

(c) An executor or administrator may accelerate the bar against damage claims of "other next of kin" by giving written notice to a potential claimant that identifies the decedent by name, states the date of the death of the decedent, identifies the executor or administrator by name and mailing address, and informs the potential claimant that any claims for damages suffered by reason of the wrongful death that the claimant may have are required to be presented to the executor or administrator in a writing within thirty days after receipt of the notice by the potential claimant. A claim of that potential claimant that is not presented in the manner provided by division (A) (1) (a) of this section within thirty days after receipt of the notice by the
potential claimant is forever barred by division (A) (1) (b) of this section in the same manner as if it was not presented within one year after the date of death of decedent.

(d) Nothing in this section shall eliminate the burden upon "other next of kin" to prove damages as described in section 2125.02 (B).

(e) Nothing in this section shall apply to the surviving spouse, the children or the parents of the decedent, all of whom are rebuttably presumed to have suffered damages by reason of the wrongful death as described in division (A) (1) of this section.

Attachment B



APPLICABLE CASE LAW

Brinkman v. Doughty

Court of Appeals of Ohio, Second Appellate District, Clark County

November 17, 2000, Rendered

C.A. Case No. 99-CA-92

Reporter
140 Ohio App. 3d 494 *; 748 N.E.2d 116 **; 2000 Ohio App. LEXIS 5346 ***

CORDIA B. BRINKMAN, ET AL., Plaintiffs-Appellants vs. JON A. DOUGHTY, ET AL., Defendants-Appellees

Prior History: **[***1]** T.C. Case No. 97-CV-0548.

Disposition: Reversed and remanded.

Core Terms

attorneys, beneficiary, fiduciary, vested, privity, decedent's, trial court, contingent, settlement, wrongful death, damages, summary judgment, siblings, malpractice action, fiduciary relationship, vested interest, next of kin, enjoyment

Case Summary

Procedural Posture
Plaintiffs appealed the judgment of the Clark County Court of Common Pleas (Ohio), which granted summary judgment in favor of the defendants, as they did not owe plaintiffs a professional duty to adequately represent them as wrongful death beneficiaries.

Overview
The plaintiffs were close relatives of the decedent, who was killed in an accident. The defendants were lawyers that represented decedent's estate and surviving children. Defendants negotiated settlements that were distributed to the decedent's children and to the defendants. Although the defendants knew that plaintiffs survived the decedent, they were not given the opportunity to approve the partial wrongful death settlement. Plaintiffs brought suit claiming the defendants refused and failed to fulfill their professional duty to adequately represent all beneficiaries and next of kin. The trial court granted defendants' motion for summary judgment, stating that legal malpractice liability to third parties arose only where the third party was in privity with the attorney's client or where the attorney acted maliciously. On appeal, the court reversed the order, as the tort that gave rise to the wrongful death claim had already occurred and the interest of the decedent's statutory beneficiaries was vested. Accordingly, there was a genuine issue of material fact as to whether defendants owed plaintiffs a professional duty to adequately represent them in settlement negotiations.

Outcome
Decision of the trial court was reversed and remanded; the tort that gave rise to the wrongful death claim had already occurred and the interest of the deceased's statutory beneficiaries was vested, not contingent. Therefore a genuine issue of material fact existed as to whether defendants owed plaintiffs a professional duty as attorneys.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Summary Judgment Review > General Overview

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

HN1[] **Standards of Review, De Novo Review**

The review of summary judgment decisions is de novo. The appellate court applies the standards used by the trial court.

Civil Procedure > ... > Summary

Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary
Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary
Judgment > Entitlement as Matter of Law > Materiality of Facts

HN2[] **Entitlement as Matter of Law, Genuine Disputes**

Summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor.

Torts > Malpractice & Professional Liability > Attorneys

Torts > Wrongful Death & Survival Actions > Potential Plaintiffs

HN3[] **Malpractice & Professional Liability, Attorneys**

An attorney is immune from liability to third persons arising from his performance as an attorney in good faith and on behalf of, and with the knowledge of his client, unless such third person is in privity with the client or the attorney acts maliciously.

Estate, Gift & Trust
Law > Wills > Beneficiaries > General Overview

Estate, Gift & Trust Law > Estate Administration > Intestate Succession > General Overview

HN4[] **Wills, Beneficiaries**

A potential beneficiary of an estate has no vested interest in the estate.

Estate, Gift & Trust
Law > Wills > Beneficiaries > General Overview

Governments > Fiduciaries

Torts > Malpractice & Professional Liability > Attorneys

HN5[] **Wills, Beneficiaries**

A beneficiary whose interest in an estate is vested is in privity with the fiduciary of the estate, and where such privity exists the attorney for the fiduciary is not immune from liability to the vested beneficiary for damages arising from the attorney's negligent performance.

Estate, Gift & Trust
Law > Wills > Beneficiaries > General Overview

Governments > Fiduciaries

Estate, Gift & Trust Law > Estate Administration > General Overview

Estate, Gift & Trust Law > ... > Probate > Personal Representatives > General Overview

HN6[] **Wills, Beneficiaries**

It is the duty of the fiduciary of an estate to serve as the representative of the entire estate. Such fiduciary, in the administration of the estate, owes a duty to beneficiaries to act in a manner which protects the beneficiaries' interests. This duty places the beneficiaries in privity with the executor.

Governments > Fiduciaries

Torts > Malpractice & Professional Liability > Attorneys

HN7[] **Governments, Fiduciaries**

An attorney retained by a fiduciary owes a similar duty to those with whom the client has a fiduciary relationship. A fortiori those persons to whom a fiduciary duty is owed are in privity with the fiduciary such that an attorney-client relationship established with the fiduciary extends to those in privity therewith regarding matters to which the fiduciary duty relates.

Governments > Fiduciaries

Torts > Malpractice & Professional Liability > Attorneys

HN8[] **Governments, Fiduciaries**

If a fiduciary relationship exists, the attorney-client relationship extends to those parties included in the fiduciary relationship.

Estate, Gift & Trust Law > ... > Probate > Personal Representatives > General Overview

Family Law > Family Relationships & Torts > Wrongful Death & Survival > Children

Family Law > Family Relationships & Torts > Wrongful Death & Survival > General Overview

Family Law > Family Relationships & Torts > Wrongful Death & Survival > Surviving Spouses

Torts > Wrongful Death & Survival Actions > General Overview

HN9[] **Probate, Personal Representatives**

Under *Ohio Rev. Code Ann. § 2125.02(A)(1)*, the personal representative of a decedent is required to bring a wrongful death action in the name of the decedent for the exclusive benefit of the surviving spouse, children, parents, and other next of kin.

Torts > Wrongful Death & Survival Actions > Remedies > General Overview

Torts > Wrongful Death & Survival Actions > General Overview

HN10[] **Wrongful Death & Survival Actions, Remedies**

Ohio Rev. Code Ann. § 2125.02(A)(3)(a) indicates that a decedent's date of death fixes the status of all beneficiaries of an action for wrongful death for purposes of determining the damages suffered. In this respect, wrongful death cases are like actions involving the contents of wills, i.e., the legal right to recovery arises or is fixed at the time of death.

Estate, Gift & Trust Law > Estate Interests > Future Interests > General Overview

Tax Law > Federal Estate & Gift Taxes > Basis of Property > General Overview

HN11[] **Estate Interests, Future Interests**

The word "vested" has a double meaning. The word "vest" is defined as to give an immediate fixed right of present or future enjoyment. An estate is vested in possession when there exists a right of present enjoyment; and an estate is vested in interest when there is a present fixed right of future enjoyment. The word "vested," standing alone, includes both present and future enjoyment so long as the right to such present or future enjoyment is presently fixed.

Estate, Gift & Trust Law > Estate Interests > Future Interests > General Overview

HN12[] **Estate Interests, Future Interests**

A contingent claim is one, the liability upon which is dependent upon some uncertain future event which may or may not occur. It is this element of dependency upon an uncertainty which renders a claim contingent.

Estate, Gift & Trust Law > Estate Interests > Future Interests > General Overview

Torts > Wrongful Death & Survival Actions > General Overview

HN13[] **Estate Interests, Future Interests**

A liability on an unliquidated claim for damages arising out of a tort does not depend for its creation upon the occurrence of some uncertain event in the future. On the contrary, such claim is, as of necessity it must be, based on the theory that the event, the tort, giving rise to liability, has already occurred, and that a cause of action has already accrued and is in existence. A claim thus grounded cannot be said to be contingent.

Counsel: TIMOTHY N. TOMA, Euclid, Ohio and NICHOLAS E. BUNCH, Cincinnati, Ohio, Attorneys for Plaintiffs-Appellants.

RICHARD E. MAYHALL, Springfield, Ohio, Attorney for Defendants-Appellees.

Judges: BROGAN, J. WOLFF, J., and YOUNG, J., concur.

Opinion by: BROGAN

Opinion

[117]** **[*496]** BROGAN, J.

This case is before us on the appeal of Plaintiffs/Appellants from a decision granting summary judgment in favor of the Defendants/Appellees. The Plaintiffs are seven siblings and the mother of Lois Butler, who died on August 7, 1994, as the result of a head-on collision. The Defendants are two lawyers and a law firm which represented Butler's estate, and also represented Butler's three surviving children, Karen, Jim, and Scott Butler. Lois Butler additionally had an eighth sibling, who is not a party to this appeal.

For purposes of summary judgment, the Defendants assumed that the facts in the complaint were true. According to the complaint, the Butler children retained Jon Doughty, James Doughty, and Doughty & Doughty as attorneys for Butler's estate on September 26, 1994. The attorneys were also retained to pursue claims for Lois Butler's wrongful death.

[*2]** Subsequently, Karen Butler was appointed administratrix of her mother's estate. On October 12, 1994, the probate court approved the retention of Doughty & Doughty. Thereafter, the Doughtys negotiated a $ 100,000 settlement with Motorists Mutual (the tortfeasor's insurance carrier). This settlement was based on an assumption that the tortfeasor's policy limits would be exhausted by the $ 100,000 payment. However, about $ 110,000 more in proceeds was still potentially available from the policy. A further settlement of $ 195,000 was later obtained from Nationwide (Mrs. Butler's underinsurance carrier).

On April 10, 1995, the probate court approved the Motorists Mutual settlement. Likewise, the probate court approved the Nationwide settlement on June 5, 1995. The settlement amounts were distributed to the three Butler children and to the Defendants for their legal services. Although the Defendants knew that Lois Butler was survived by a mother and several siblings, the mother and siblings were not listed as next of kin on the application to approve the partial wrongful death settlement. Further, Defendants did not try to obtain any settlement or recovery for any next of kin other than **[***3]** the Butler children. The Plaintiffs were not notified of the settlements, hearings, or approvals. In fact, they did not learn about the probate court proceedings until August, 1996.

On June 27, 1997, Plaintiffs filed a legal malpractice action against Jon Doughty, James Doughty, and Doughty & Doughty. In the complaint, Plaintiffs alleged that the Defendants refused and failed to fulfill their professional duty to adequately represent all beneficiaries and next of kin. After discovery was conducted, the Defendants filed a motion for summary judgment.

On November 19, 1999, the trial court issued a decision granting summary judgment to the Defendants. In the decision, the trial court noted that legal malpractice liability to third parties arises only where **[**118]** the third party is in privity **[*497]** with the attorney's client or where the attorney acts maliciously. Concerning the first point, the court found that the interests of the decedent's mother and siblings were not vested, but were subject to a contingency. Accordingly, the court concluded that the Plaintiffs' interests were only potential and that the Plaintiffs were not in privity with the fiduciary for the estate. This being the case, **[***4]** the attorneys for the fiduciary owed no duty to Plaintiffs. The court also found that Defendants had not acted maliciously.

Seven of the eight siblings who originally filed the complaint, and Mrs. Butler's mother, Cordia Brinkman, now appeal from the summary judgment decision. In a single assignment of error, the Plaintiffs assert that the trial court erred in granting the motion for summary judgment. The specific issue presented for review is whether Defendants owed a professional duty as attorneys to adequately represent the Plaintiffs.

Before addressing this point, we note that our *HN1*[↑] review of summary judgment decisions is *de novo*, i.e, we apply the standards used by the trial court. *Long v. Tokai Bank of California (1996), 114 Ohio App. 3d 116, 119, 682 N.E.2d 1052*. Under established standards: *HN2*[↑] summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3)

reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor.

Zivich v. Mentor Soccer Club, Inc. (1998), 82 Ohio St. 3d 367, 369-370, 696 N.E.2d 201. **[***5]**

In the present case, there is nothing to construe in Plaintiffs' favor, since Defendants accepted the facts in the complaint as true. Furthermore, the general law regarding an attorney's liability to third parties is not disputed. Specifically:

HN3[↑] an attorney is immune from liability to third persons arising from his performance as an attorney in good faith and on behalf of, and with the knowledge of his client, unless such third person is in privity with the client or the attorney acts maliciously.

Scholler v. Scholler (1984), 10 Ohio St. 3d 98, 462 N.E.2d 158, paragraph one of the syllabus. Given these facts, the only pertinent question is whether the trial court was legally correct when it found a lack of privity between the wrongful death beneficiaries and the administratrix.

As we mentioned, the trial court concluded that the beneficiaries had a "contingent," rather than a "vested" interest. Plaintiffs contend this is incorrect, because the wrongful death statute (*R.C. 2125.02*) fixes the status of beneficiaries as of the decedent's death. According to Plaintiffs, wrongful death beneficiaries are the "real parties in interest," and **[***6]** the administratrix is merely a **[*498]** nominal party. Further, because the administratrix owes a fiduciary duty to each statutory beneficiary, the attorneys she retains owe the beneficiaries a corresponding duty of care.

In response, Defendants claim that the siblings' interests are merely contingent because the wrongful death statute does not presume that they have suffered damages. Notably, Defendants make no similar assertion about Cordelia Brinkman, the decedent's mother, who was within the class of persons "rebuttably presumed" to have suffered damages as a result of Lois Butler's death. See *R.C. 2125.02(A)(1)*.

In *Simon v. Zipperstein (1987), 32 Ohio St. 3d 74, 76-77, 512 N.E.2d 636*, the Ohio Supreme Court held that ***HN4***[↑] a potential **[**119]** beneficiary of an estate had no vested interest in the estate. Accordingly, the court held that the beneficiary lacked privity and could not sue the estate's attorney for negligently failing to comply with the decedent's testamentary intent. Subsequently, in *Elam v. Hyatt Legal Services, Inc. (1989), 44 Ohio St. 3d 175, 541 N.E.2d 616*, the Ohio Supreme Court held that:

HN5[↑] A beneficiary whose interest in **[***7]** an estate is vested is in privity with the fiduciary of the estate, and where such privity exists the attorney for the fiduciary is not immune from liability to the vested beneficiary for damages arising from the attorney's negligent performance.

Id. at syllabus. In particular, the Court stressed that:

HN6[↑] It is the duty of the fiduciary of an estate to serve as the representative of the entire estate. Such fiduciary, in the administration of the estate, owes a duty to beneficiaries to act in a manner which protects the beneficiaries' interests. We believe this duty places the beneficiaries in privity with the executor.

Id. at 176.

Significantly, the Court commented that "at first blush," its holding appeared to contradict *Zipperstein*. However, the court distinguished *Zipperstein* by pointing to the lack of doubt about the status of the beneficiaries in its current case. Specifically, the beneficiaries were remaindermen who had been deprived, at least temporarily, of their interest in the decedent's property due to an attorney's negligent preparation of a deed. (The deed conveyed the property in fee simple and ignored the remaindermen's interest). **[***8]** As was noted, the Court observed that the remaindermen clearly had a vested interest. *Id. at 177*. Ironically, the Court then said in a footnote:

We note without comment that, while the holding in *Zipperstein, supra*, was based largely on the fact that the person in question was only a potential beneficiary, a review of the facts seems to indicate that the person's interest was vested.

Id. at 177, n. 2. **[*499]**

Zipperstein involved a malpractice action against an attorney who had drafted both an antenuptial agreement and a will for a divorced father. *Zipperstein, 32 Ohio St. 3d at 74-75*. Although the antenuptial agreement limited the survivorship interest of the decedent's new wife, the will (which was drafted later) did not mention the

agreement. As a result, the wife obtained more property than the decedent appeared to have intended.

After the father died, his son, who was a beneficiary under the will, filed a malpractice action against the attorney. *Id.* Under these circumstances, the Ohio Supreme Court held that the son was only a potential beneficiary and had no vested interest in the estate. The court's later observations **[***9]** in *Elam*, of course, cast doubt on this holding, since the son's interest appears to be as "vested" as that of the remaindermen in *Elam*.

Subsequently, the Ohio Supreme Court appeared to expand *Elam* and to disregard the notion that an interest must be "vested." In this regard, the court indicated that privity arises as a result of the fiduciary relationship itself. Specifically, the Court said that:

Elam therefore recognizes that HN7[↑] an attorney retained by a fiduciary owes a similar duty to those with whom the client has a fiduciary relationship. * * *

A fortiori those persons to whom a fiduciary duty is owed are in privity with the fiduciary such that an attorney-client relationship established with the fiduciary **[**120]** extends to those in privity therewith regarding matters to which the fiduciary duty relates.

Arpadi v. First MSP Corp. (1994), 68 Ohio St. 3d 453, 458, 628 N.E.2d 1335.

Zipperstein, Elam, and *Arpadi* did not involve wrongful death beneficiaries, but *Elam* and *Arpadi* did deal with fiduciary relationships between the direct client of the attorney and the party bringing the malpractice action. Given the Supreme Court's **[***10]** holdings in these cases, Karen Butler's attorney-client relationship with the Defendants extended to the statutory beneficiaries. Like the fiduciaries in *Arpadi* and *Elam*, Karen Butler owed a fiduciary duty to all statutory beneficiaries, and they were, therefore, in privity with her for purposes of her attorney-client relationship with the Defendants.

We note that we reached a similar result in *Depugh v. Sladoje (1996), 111 Ohio App. 3d 675, 676 N.E.2d 1231*, although in a slightly different factual situation, i.e, in *DePugh,* an estate's *administrator* was allowed to bring suit against an attorney who had individually represented a wrongful death beneficiary. In *DuPugh*, the decedent's father was appointed administrator, and he then filed a wrongful death action. One group of attorneys represented the father as the administrator and as a beneficiary, and another attorney represented the decedent's common-law wife. After a dispute arose, the father agreed to resign as **[*500]** administrator. His attorneys also dismissed the wrongful death action in the mistaken belief that the savings statute applied and would provide an additional year for filing suit. However, **[***11]** the savings statute did not apply because the statute of limitations had not yet elapsed when the suit was dismissed. *Id. at 678-79*.

By the time the wife was appointed to administer the estate, the statute of limitations had expired, but the attorneys did not realize it. Instead, they filed new actions on behalf of the administrator and the father. Subsequently, the father's suit was dismissed because of the expiration of the limitations period, and the estate's suit was settled for a nominal sum, allegedly due to the attorneys' belated realization that the statute of limitations had expired. *Id. at 679*.

Ultimately, the father was again appointed administrator. He then filed a malpractice action against his own attorneys as well as the wife's attorneys. These latter attorneys did not represent the estate before the limitations period expired; rather, they represented the wife in her personal capacity. Citing *Elam*, the father argued that he was in privity with the wife as a vested beneficiary of the estate and could, therefore, assert a claim against her attorneys. *Id. at 682*.

In considering this claim, we noted that it was **[***12]** the reverse of the one presented in *Elam.* Specifically, *Elam* involved a beneficiary's claim against the attorney, while *Depugh* involved the administrator's malpractice claim on behalf of a beneficiary of the estate. *Id. at 682-83*. Nonetheless, we concluded that:

the rationale by which the Supreme Court held in *Elam* that privity exists between the beneficiary of an estate and the fiduciary so as to support the beneficiary's legal malpractice action against the fiduciary's attorney is equally persuasive under the facts in this case. To the extent that * * * [the attorneys'] wrongful representation of * * * [the wife] as a beneficiary of the estate compromised the estate's wrongful death claim * * *, we hold that the estate may have a malpractice action against them.

Id. at 683. **[**121]**

In *DePugh*, we did not discuss the status of the beneficiaries under the wrongful death statute. Moreover, unlike the present case, *DePugh* did not involve "other next of kin." Instead, the father and

common-law wife were persons, like Cordelia Brinkman, who were rebuttably presumed under R.C. 2125.02 to have suffered **[***13]** damages. However, these distinctions are insignificant. As we noted, the Ohio Supreme Court has held that *HN8*[↑] if a fiduciary relationship exists, the attorney- client relationship extends to those parties included in the fiduciary relationship.

[*501] Furthermore, even if the Supreme Court had adhered to its distinction between "vested" and "contingent" interests, all the statutory wrongful death beneficiaries had a vested interest. Specifically, *HN9*[↑] under R.C. 2125.02(A)(1), the personal representative of the decedent is required to bring a wrongful death action in the name of the decedent for the exclusive benefit of the surviving spouse, children, parents, and other next of kin. *HN10*[↑] R.C. 2125.02(A)(3)(a) additionally indicates that the decedent's date of death fixes the status of all beneficiaries of an action for wrongful death for purposes of determining the damages suffered. In this respect, wrongful death cases are like actions involving the contents of wills, i.e., the legal right to recovery arises or is fixed at the time of death. In our opinion, this is sufficient to give the beneficiaries a vested interest.

Defendants contend that the **[***14]** siblings' right to recover was not vested because they must prove damages to recover. According to the Ohio Supreme Court:

HN11[↑] the word 'vested' has a double meaning. The word 'vest' is defined in Bouvier's Law Dictionary (3 Rev.) as 'to give an immediate fixed right of present or future enjoyment. An estate is vested in possession when there exists a right of present enjoyment; and an estate is vested in interest when there is a present fixed right of future enjoyment.'

The word 'vested,' standing alone, includes both present and future enjoyment so long as the right to such present or future enjoyment is presently fixed.

Brown v. Buyer's Corp. (1973), 35 Ohio St. 2d 191, 195-96, 299 N.E.2d 279. By contrast,

HN12[↑] a contingent claim is one, the liability upon which is dependent upon some uncertain future event which may or may not occur. It is this element of dependency upon an uncertainty which renders a claim contingent.

* * *

HN13[↑] A liability on an unliquidated claim for damages arising out of a tort does not depend for its creation upon the occurrence of some uncertain event in the future. On the contrary, such claim is, as of necessity it must be, based on the **[***15]** theory that the event, the tort, giving rise to liability, has already occurred, and that a cause of action has already accrued and is in existence. A claim thus grounded cannot be said to be contingent.

Pierce v. Johnson (1939), 136 Ohio St. 95, 98-99, 23 N.E.2d 993. Consequently, because the tort giving rise to the claim for Butler's wrongful death had already occurred, the interest of Butler's statutory beneficiaries was vested, not contingent. The fact that the beneficiaries had to prove their damages did not make their interest contingent. Indeed, if this were the case, all tort claims would be "contingent," since proof of damages is always required as a **[*502]** basis for recovery. As was noted, the Ohio Supreme Court has used a different analysis for deciding whether claims are contingent.

[122]** As an alternate basis for the trial court's decision, Defendants contend that privity is lacking with regard to all beneficiaries because all Plaintiffs disclaimed any interest in the proceeds of the settlement from Lois Butler's wrongful death. However, these facts were not stipulated in the trial court, nor was this argument addressed below. Accordingly, we decline to consider **[***16]** it. See, *e.g.*, Dayton Monetary Assoc. v. Becker (1998), 126 Ohio App. 3d 527, 539, 710 N.E.2d 1151 (appellate court will not consider materials that were not presented to the trial court). If necessary, the trial court can address this issue on remand.

Defendants' final argument is that recognizing attorney liability in this type of situation opens "Pandora's Box," and will make attorneys hesitant to settle cases before trial or appeal. As authority for this theory, Defendants cite the dissenting opinion in DePugh, supra. In the dissent, Judge Young observed that lawyers will be reluctant to settle cases if their judgment can later be questioned by potential beneficiaries of the settlement. 111 Ohio App. 3d at 689-90. However, we declined to adopt that position in *DePugh*, and do not need to further address it here.

In light of the preceding discussion, the Plaintiffs' single assignment of error is sustained. The decision of the trial court is reversed, and this case is hereby remanded

to the trial court for further proceedings consistent with this opinion.

WOLFF, J., and YOUNG, J., concur.

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Senig v. Nationwide Mut. Ins. Co.

Court of Appeals of Ohio, Tenth Appellate District, Franklin County

July 23, 1992, Decided

Nos. 91AP-1416, 91AP-1425

Reporter
76 Ohio App. 3d 565 *; 602 N.E.2d 438 **; 1992 Ohio App. LEXIS 3830 ***

SENIG et al., Appellees and Cross-Appellants, v. NATIONWIDE MUTUAL INSURANCE COMPANY et al., Appellants and Cross-Appellees

Prior History: [***1] APPEALS from the Franklin County Court of Common Pleas.

Disposition: *Judgment affirmed in part, reversed in part and cause remanded.*

Core Terms

insured, decedent, uninsured motorist coverage, damages, assigned error, wrongful death, next of kin, coverage, bodily injury, trial court, plaintiffs', summary judgment, uninsured motorist, minor child, uninsured, entitled to recover damages, legally entitled to recover, wrongful death statute, insurance company, grandchildren, underinsured, provides, underinsured motorist coverage, automobile insurance policy, automobile accident, claim for damages, exclusive benefit, requirements, presumed, nearest

Case Summary

Procedural Posture

Plaintiffs, two brothers, filed a complaint against defendants, two insurance companies, seeking a declaratory judgment that they and their minor children could each claim damages for the wrongful death of decedent, their father, under their respective insurance policies. The Franklin County Court of Common Pleas (Ohio) granted plaintiffs' motion for summary judgment. Defendants appealed the trial court's decision. Plaintiffs cross-appealed.

Overview

The decedent was killed in a car accident caused by the negligence of an uninsured motorist. At the time of the accident, the decedent was not residing with either plaintiff and had uninsured and underinsured motorist coverage with his insurer. The first brother had an automobile insurance policy with the first insurance company that provided uninsured and underinsured motorists coverage. That policy provided that the insured was entitled to damages due the insured by law from the owner or driver of an underinsured vehicle. The second brother had a similar insurance policy with the second insurance company. However, the second insurance company policy restricted recovery by providing that the insured had to be the person to suffer bodily injury. The court held that plaintiffs fell within Ohio Rev. Code Ann. § 3937.18 and were entitled to uninsured motorist coverage under both insurance company's policies. First, plaintiffs were insured under their respective policies. Second, plaintiffs were legally entitled to recover for the death of their father, which was caused by the malfeasance of an uninsured motorist, pursuant to the wrongful death statute, Ohio Rev. Code Ann. § 2125.02.

Outcome

The court affirmed in part and reversed in part the trial court's judgment.

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN1[] Entitlement as Matter of Law, Appropriateness

Ohio R. Civ. P. 56(C) specifically provides that before summary judgment may be granted, it must be determined that: (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. Furthermore, the moving party has the burden of demonstrating that there remain no genuine issues of material fact.

Insurance Law > ... > Coverage > Uninsured Motorists > General Overview

HN2[] Coverage, Uninsured Motorists

Ohio Rev. Code Ann. § 3937.18 provides protection for insured persons for damages for bodily injury and death, inter alia, which they are legally entitled to recover from owners or operators of uninsured motor vehicles.

Family Law > Family Relationships & Torts > Wrongful Death & Survival > Children

Insurance Law > ... > Coverage > Uninsured Motorists > General Overview

Family Law > Family Relationships & Torts > Wrongful Death & Survival > General Overview

HN3[] Wrongful Death & Survival, Children

An insured father is entitled to recover those damages, which he was legally obligated to pay, under his uninsured motorist coverage for the wrongful death of a minor child, even if the child was not an insured according to the terms of the policy.

Family Law > Family Relationships & Torts > Wrongful Death & Survival > Surviving Spouses

Insurance Law > ... > Coverage > Uninsured Motorists > General Overview

Torts > Wrongful Death & Survival Actions > General Overview

Family Law > Family Relationships & Torts > Wrongful Death & Survival > General Overview

Family Law > Family Relationships & Torts > Wrongful Death & Survival > Children

HN4[] Wrongful Death & Survival, Surviving Spouses

Ohio Rev. Code Ann. § 2125.02 provides that an action for wrongful death shall be brought for the exclusive benefit of the surviving spouse, the children, and the parents of the decedent.

Family Law > Family Relationships & Torts > Wrongful Death & Survival > Children

Torts > Wrongful Death & Survival Actions > Remedies > General Overview

Family Law > Family Relationships & Torts > Wrongful Death & Survival > General Overview

Torts > Wrongful Death & Survival Actions > General Overview

HN5[] Wrongful Death & Survival, Children

Ohio Rev. Code Ann. § 2125.02(A) provides that the wrongful death action is for the exclusive benefit of the children all of whom are rebuttably presumed to have suffered damages by reason of the wrongful death.

Torts > ... > Pain & Suffering > Emotional Distress > Evidence

Torts > ... > Pain & Suffering > Emotional Distress > General Overview

Torts > Wrongful Death & Survival Actions > General Overview

Torts > ... > Types of Damages > Compensatory Damages > Loss of Consortium

Torts > ... > Types of Damages > Compensatory Damages > Pain & Suffering

HN6[] **Emotional Distress, Evidence**

Pursuant to the Ohio wrongful death statute, Ohio Rev. Code Ann. § 2125.02, other next of kin, although not presumed to have sustained damages, may recover damages for mental anguish and loss of society upon proper proof thereof, even though there is a surviving parent, spouse, or minor children.

Counsel: *Clark, Perdue & Roberts Co., L.P.A., Dale K. Perdue* and *Glen R. Pritchard*, for appellees and cross-appellants.

Crabbe, Brown, Jones, Potts & Schmidt, William H. Jones and *Andrew W. Cecil*, for appellant and cross-appellee Nationwide Mutual Insurance Co.

Siemer, Leighton & Love and *Walter J. Siemer*, for appellant and cross-appellee Lightning Rod Mutual Insurance Co.

Judges: Whiteside, Judge. Bowman and Petree, JJ., concur.

Opinion by: WHITESIDE

Opinion

[*566] **[**439]** Defendant Nationwide Mutual Insurance Company ("Nationwide"), in case No. 91AP-1416, appeals the judgment of the Franklin County Court of Common Pleas and raises the following three assignments of error:

1. "The trial court erred in finding James R. Senig is entitled to coverage for the death of his father pursuant to the automobile insurance policy issued by Nationwide to James R. Senig. The court's reliance on *Sexton v. State Farm Mutual [Automobile]* Insurance Company (1982), 69 Ohio St.2d 431 [23 O.O.3d 385, 433 N.E.2d 555] and Wood v. Shepard **[***2]** (1988), 38 Ohio St.3d 86 [526 N.E.2d 1089] is misplaced in that neither of these cases appl[ies] to the within action."

2. "Plaintiff is not entitled to make a claim for damages under Ohio statutory law."

3. "The policy in question does not provide underinsurance coverage for the accident in question."

Defendant Lightning Rod Mutual Insurance Company ("Lightning Rod"), in the connected appeal, 91AP-1425, appeals the same judgment of the Franklin County Court of Common Pleas and raises the following five assignments of error:

[*567] 1. "The trial court erred in finding Michael Senig is entitled to coverage for the death of his father, John Senig, pursuant to the automobile insurance policy issued by Lightning Rod to Michael Senig. The court's reliance on *Sexton v. State Farm Mutual [Automobile]* Insurance Co., (1982), 69 Ohio St.2d 431 [23 O.O.3d 385, 433 N.E.2d 555] and Wood v. Shepard (1988), 38 Ohio St.3d 86 [526 N.E.2d 1089] is misplaced in that these cases do not apply to the within action."

2. "Plaintiff Michael Senig and his issue are not entitled to make a claim for damages under Ohio statutory law."

3. "The policy in question does not provide underinsurance **[***3]** coverage for the accident in question."

4. "In ruling that the Lightning Rod Mutual Insurance Company has coverage to pay damages to Michael Senig for the death of his father, the trial court failed to give effect to the exclusionary language of the policy that his (Michael Senig) damages must result from bodily harm sustained by him as an insured and he (Michael Senig) did not personally suffer any bodily harm and John Senig was not an insured."

5. "The trial court erred in failing to give effect to the limiting language of the Lightning Rod Mutual Insurance Company policy that the uninsured motorists coverage provided by the policy with respect to a vehicle not owned by Michael Senig shall be excess over any other collectible insurance."

Plaintiffs, James R. and Michael S. Senig, cross-appeal in case Nos. 91AP-1416 and 91AP-1425, respectively. Plaintiffs raise a single assignment of error, as follows:

"The trial court erred in holding that the decedent's grandchildren are not legally entitled to recover under the wrongful death statute, and therefore, are not entitled to uninsured motorist coverage."

[440]** Inasmuch as these appeals have been consolidated *sua sponte* **[***4]** by this court, we will decide them together in a single opinion.

John Senig, the father of plaintiffs Michael and James Senig, who are brothers, was killed in an automobile accident caused by the negligence of an uninsured motorist. At the time of the accident, decedent was not residing with either plaintiff and had uninsured and underinsured motorist coverage with United Ohio Insurance Company ("United Ohio") for $ 100,000 per person and $ 300,000 per occurrence. Decedent's widow, Helen Senig, was named the executor of his estate, to which United Ohio paid $ 88,500 in damages pursuant to decedent's uninsured motorist coverage. Plaintiffs each received $ 4,454.19 from the probate court's distribution of this insurance award.

[*568] Plaintiffs James and Michael Senig, individually and in their capacity as guardians for their minor children, filed a complaint seeking a declaratory judgment that they and their minor children could each claim damages for the wrongful death of decedent under their respective insurance policies. Plaintiff James Senig had an automobile insurance policy with defendant Nationwide that provided uninsured and underinsured motorists coverage with limits **[***5]** of $ 25,000 per person and $ 50,000 per occurrence. The Nationwide policy provides that the insured is entitled to damages "due [the insured] by law from the owner or driver of an underinsured vehicle." Both of James Senig's minor children, eleven months old and three years old, are insured under his policy.

Plaintiff Michael Senig had a similar insurance policy with defendant Lightning Rod that provided uninsured and underinsured motorist coverage with liability limits of $ 100,000 per person and $ 300,000 per occurrence. However, the Lightning Rod policy restricts recovery by providing that the *insured* must be the person to suffer bodily injury. Michael Senig's two minor children, nine years old and ten months old, are insured under his policy.

Plaintiffs moved for summary judgment, which the trial court granted based on the authority of Sexton v. State Farm Mut. Auto. Ins. Co. (1982), 69 Ohio St.2d 431, 23 O.O.3d 385, 433 N.E.2d 555; *Ross v. Nationwide Mut. Ins. Co.* (Sept. 27, 1990), Franklin App. No. 90AP-165, unreported, 1990 WL 140549, appeal dismissed (1992), 63 Ohio St.3d 33, 584 N.E.2d 1184; and Barr v. Ins. Co. of N. Am. (1991), 72 Ohio App.3d 595, **[***6]** 595 N.E.2d 531. Defendant Nationwide timely appealed, as did defendant Lightning Rod. Plaintiffs filed a timely cross-appeal.

The Supreme Court of Ohio delineated the elements for granting summary judgment in Temple v. Wean United, Inc. (1977), 50 Ohio St.2d 317, 327, 4 O.O.3d 466, 472, 364 N.E.2d 267, 273:

HN1[↑] "Civ. R. 56(C) specifically provides that before summary judgment may be granted, it must be determined that: (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party."

Furthermore, the moving party has the burden of demonstrating that there remain no genuine issues of material fact, Harless v. Willis Day Warehousing Co. (1978), 54 Ohio St.2d 64, 8 O.O.3d 73, 375 N.E.2d 46.

[*569] By defendant Nationwide's three assignments of error and by defendant Lightning Rod's first four assignments of error, defendants raise the following determinative **[***7]** issue: whether the uninsured motorist coverage in defendants' respective automobile insurance policies issued to plaintiffs cover plaintiffs' claims arising out of the death of their father, who was not insured under either policy.

This issue has been decided by the Ohio Supreme Court in Sexton, supra, the syllabus of which provides as follows:

"1. HN2[↑] R.C. 3937.18 provides protection for insured persons for damages for bodily injury **[**441]** and death, *inter alia*, which they are legally entitled to recover from owners or operators of uninsured motor vehicles.

"2. HN3[↑] An insured father is entitled to recover those damages, which he was legally obligated to pay, under his uninsured motorist coverage for the wrongful death of a minor child, even if the child was not an insured according to the terms of the policy."

In *Sexton*, the plaintiff claimed wrongful death damages

from his insurance company as a result of his daughter's death in an automobile accident caused by an uninsured motorist. The plaintiff's uninsured motorist coverage limited recovery to an insured who had suffered bodily injury and who resided in plaintiff's household. The court found the restrictions to **[***8]** be contrary to R.C. 3937.18(A), which mandates that uninsured motorist coverage be offered in automobile insurance policies.

The court reasoned that, to come within the meaning of the statute, four requirements must be met. First, there must be an insured. Second, the insured must be entitled to recover damages sustained because of injury or death caused by an uninsured motorist. Third, the damages must result from injury, sickness, disease or death. Fourth, the tortfeasor must be the owner or operator of the uninsured motor vehicle.

The court succinctly stated that the first, third, and fourth requirements had been met by the plaintiff. As for the second requirement that the insured be entitled to recover damages, the court stated that the plaintiff was legally entitled to recover damages under R.C. 2125.02, the wrongful death statute. Having found that the plaintiff came under the meaning of R.C. 3937.18, the court concluded that the limitations in plaintiff's uninsured motorist coverage were contrary to law and void, stating in Sexton, supra, at 434-436, 23 O.O.3d at 387-388, 433 N.E.2d at 558-560:

"Although the statute does not indicate who must have sustained the **[***9]** bodily injury, it does not specify that it be the insured. Because the statute should be construed liberally, * * * we will not add that limitation. The pertinent **[*570]** language of the statute requires that the insured be legally entitled to recover damages because of bodily injury. * * *

"* * *

"Statutory mandates must be complied with by insurers. The restrictions in this policy, which permit an insurer to avoid providing uninsured motorist coverage, thwart the legislative intent. Therefore, the restrictions are contrary to R.C. 3937.18 and void."

Thus, the court held that the plaintiff was entitled to claim wrongful death damages under his uninsured motorist coverage despite limiting language in the policy.

This court has repeatedly followed the principle of *Sexton*. In Barr, supra, the plaintiff's mother was killed in an automobile accident caused by an uninsured motorist. The plaintiff's uninsured motorist coverage restricted recovery to bodily injury suffered by an insured, and plaintiff's mother was not insured under the policy. The trial court granted summary judgment for the defendant insurance company, which we reversed. We found *Sexton* to be **[***10]** controlling and determined that the plaintiff's uninsured motorist policy covered the plaintiff's claim arising out of the death of his mother, despite the restriction in the policy.

Later, in Nationwide Mut. Ins. Co. v. Chivington (1991), 72 Ohio App.3d 700, 595 N.E.2d 1002, the defendants' parents were killed as the result of an automobile accident caused by the negligence of an underinsured motorist. The defendants' uninsured/underinsured [1] motorist policy provided that the insured could recover damages for bodily injury "that are due [the insured] by law." Because the defendants' insurance contract was not contrary to R.C. 3937.18 and was consistent with the principle of Sexton, supra, we reversed the trial **[**442]** court's granting of summary judgment for the plaintiff.

[*11]** In *Ross, supra*, we held that the sister and daughter of a decedent, who was killed in an automobile accident by an underinsured motorist, could recover damages for the wrongful death of the decedent pursuant to their underinsured motorist coverage. Like the defendants in Nationwide, supra, the plaintiffs in *Ross* had uninsured and underinsured motorist coverage that provided for the insured to recover damages for bodily injury that were "due [the insured] by law." As in *Nationwide*, we reversed the trial court's granting of summary judgment for defendant since plaintiffs' policy was consistent with R.C. 3937.18 and *Sexton*.

[*571] In all of these cases (*Barr, Nationwide* and *Ross*), we were bound by the controlling Supreme Court case, *Sexton*, because the facts were indistinguishable. However, in *Erie Ins. Group v. McCoy* (Jan. 9, 1992), Franklin App. No. 91AP-631, unreported, 1992 WL 4857, we distinguished *Sexton*, as well as Barr, supra, and Nationwide, supra. Although defendants rely upon *Erie*, we find no basis upon which to distinguish the case herein from *Sexton, Barr* and *Nationwide*. Since the *Erie* court distinguished **[***12]** *Sexton, Barr* and

[1] We explained the difference between uninsured motorist coverage and underinsured motorist coverage in that opinion. Since the underinsured motorist coverage is not at issue herein, we will not concern ourselves with the distinction.

Nationwide, it necessarily follows that this case is, likewise, distinguishable from *Erie*.

Thus, applying the criteria set forth in *Sexton*, plaintiffs Michael and James Senig fall within R.C. 3937.18 and are entitled to uninsured motorist coverage under the Nationwide and Lightning Rod policies. First, said plaintiffs are concededly insured under their respective policies, which provide uninsured motorist coverage. Second, said plaintiffs [2] are legally entitled to recover for the death of their father, which was caused by the malfeasance of an uninsured motorist, pursuant to the wrongful death statute, R.C. 2125.02. HN4[↑] Such statute provides that an action for wrongful death shall be brought "for the exclusive benefit of the surviving spouse, *the children*, and the parents of the decedent * * *." (Emphasis added.) Because plaintiffs are the children of decedent, they clearly come within the scope of the statute and are entitled to recover damages for decedent's wrongful death. Third, the damages claimed by plaintiffs admittedly result from the death of their father. Also, HN5[↑] R.C. 2125.02(A) provides that the wrongful death action is for the "exclusive **[***13]** benefit of * * * the children * * * all of whom are rebuttably presumed to have suffered damages by reason of the wrongful death." Unless and until rebutted by defendants, the plaintiffs are presumed to have suffered damages. Finally, the tortfeasor in this case was both the owner and operator of the uninsured motor vehicle involved in the accident. Consequently, the requirements of *Sexton* have been satisfied, and plaintiffs Michael and James Senig are entitled to claim damages under their uninsured motorist coverage.

In sum, the trial court did not err in granting summary judgment for plaintiffs Michael and James Senig. Because there remain no genuine issues of material fact and, as a matter of law, said plaintiffs are entitled to recover damages for the death of their father under their respective insurance policies, summary judgment **[***14]** was properly granted. Accordingly, defendant Nationwide's three assignments of error and defendant Lightning Rod's first two assignments of error are not well taken.

[*572] By its third assignment of error, Lightning Rod contends that coverage should be denied because its insured did not live in the same household with the decedent, relying upon *Erie, supra*. Such contention is contrary to the holdings in Sexton, supra, Barr, supra, and Nationwide, supra, all of which were distinguished by this court in *Erie*. Here, however, we are unable to distinguish *Sexton, Barr*, or *Nationwide*, which permit no deviation from R.C. 3937.18(A) on the basis that the insured and decedent did not live together. Neither does R.C. 2125.02(A) permit such an automatic distinction between children who are rebuttably presumed **[**443]** to have suffered damage as a result of the wrongful death of their parent. *Lightning Rod's* third assignment of error is not well taken.

Defendant Lightning Rod argues that the limiting language in its policy issued to plaintiff Michael S. Senig prohibits plaintiffs' claim for uninsured motorist coverage. The limiting language to which **[***15]** Lightning Rod refers is as follows:

"We will pay damages which an insured is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of bodily injury sustained by an insured and caused by an accident. * * *"

Lightning Rod asserts that, because decedent was not insured under the policy and the policy clearly requires an insured to suffer bodily injury in order to recover, plaintiffs may not recover. This same language and argument were rejected by the Supreme Court in Sexton, supra. That court held such a policy restriction to be contrary to the legislative purpose of R.C. 3937.18 and unenforceable. See Sexton, supra. For the same reasons, we find the provision in Lightning Rod's policy issued to plaintiff Michael Senig to be void and unenforceable. Lightning Rod's fourth assignment of error is not well taken.

By defendant Lightning Rod's fifth assignment of error, it contends that before plaintiff Michael Senig is entitled to collect under his uninsured motorist coverage with Lightning Rod, the limits of any other collectible insurance must have been reached. Defendant Lightning Rod argues that decedent's own uninsured motorist coverage **[***16]** must be exhausted before plaintiff Michael Senig may claim uninsured motorist coverage under his policy.

In support of this contention, defendant Lightning Rod points to the following provision in the uninsured motorist policy:

"OTHER INSURANCE

"If there is other applicable similar insurance, we will pay

[2] Whether plaintiffs' minor children are also legally entitled to recover for the wrongful death of decedent will be discussed under plaintiffs' sole assignment of error.

only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. If this policy and any other policy providing **[*573]** similar insurance apply to the same accident, the maximum limit of liability under all the policies shall be the highest applicable limit of liability under any one policy. However, any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance."

Defendant Lightning Rod also cites the following sentence in the policy:

"* * * We will pay under this coverage only after the limits of liability under any applicable bodily injury liability bonds or policies have been exhausted by payment of judgments of settlements."

The issue as raised by defendant Lightning Rod under this assignment of error pertains to the amount of damages and not to whether **[***17]** coverage exists. Because the trial court in granting summary judgment addressed the issue of liability alone, the issue of the amount of recovery is not properly before us on appeal. The limitation does not prevent coverage where the damages exceed the maximum coverage limit under the other policy but instead merely limits coverage to the extent of such excess. Accordingly, defendant Lightning Rod's fifth assignment of error is not well taken.

By plaintiffs' single assignment of error, they contend that the trial court erred as a matter of law in finding that their minor children are not entitled to recover damages for the wrongful death of decedent.

The trial court ruled that plaintiffs' minor children, although insured under plaintiffs' uninsured motorist coverage, were not entitled to recover damages for decedent's wrongful death because they were not "other next of kin" within the purview of the wrongful death statute.

As stated previously, plaintiffs Michael and James Senig are entitled to recover damages under their uninsured motorist coverage because they come within the ambit of R.C. 3937.18. One requirement of the statute, as explained in Sexton, supra, is that **[***18]** the claimant be entitled to recover damages for the bodily injury caused by the uninsured motorist. R.C. 2125.02 provides that an action for wrongful death shall be brought "for the exclusive **[**444]** benefit of the surviving spouse, *the children*, and the parents of the decedent, all of whom are rebuttably presumed to have suffered damages by reason of the wrongful death, and for the exclusive benefit of the *other next of kin* of the decedent." (Emphasis added.) Consequently, as children of decedent, plaintiffs James and Michael Senig are beneficiaries under the statute.

The issue presented by plaintiffs' assignment of error, however, is whether, under the circumstances herein, the grandchildren of decedent are beneficiaries under the statute. The wrongful death statute does not expressly include grandchildren. It does, however, provide that a claim may be for the "* * * exclusive benefit of the *other next of kin* of the decedent." (Emphasis **[*574]** added.) Grandchildren are kin and may be *next* of kin in some instances, but the question is whether they are *next* of kin of their grandparents while their parents are still living. Plaintiffs contend that grandchildren **[***19]** qualify as "other next of kin" of decedent and are consequently beneficiaries under the statute.

Black's Law Dictionary (5 Ed.1979) 941, explains that "next of kin" has the following meanings:

"* * * (1) *nearest* blood relations according to law of consanguinity and (2) those entitled to take under statutory distribution of intestate's estates, and term is not necessarily confined to relatives by blood, but may include a relationship existing by reason of marriage * * *." (Emphasis added.)

A standard dictionary, Random House Dictionary (2 Ed.1987 unabridged) 1296, similarly defines "next of kin" as:

"1. a person's nearest relative or relatives; * * * 2. *Law.* the nearest relative or relatives who share in the estate of a person who dies intestate."

In other words, ordinarily, the *nearest* relatives of a decedent are his or her "next of kin." Not all kin or relatives of a decedent are "*next* of kin," regardless of the degree of relationship. Rather, under this construction, the relatives *nearest* to decedent are the "next of kin." Thus, "next of kin" includes all blood relatives of the same degree of relationship. For this purpose, the degree of relationship necessarily **[***20]** is determined by counting outward from the decedent rather than downward from a common ancestor.

However, the Ohio Supreme Court has recently resolved this issue, stating in paragraph two of the

syllabus [3] of *Ramage v. Central Ohio Emergency Serv., Inc. (1992), 64 Ohio St.3d 97, 592 N.E.2d 828*:

HN6[↑] "Pursuant to the Ohio wrongful death statute, *R.C. 2125.02*, other next of kin, although not presumed to have sustained damages, may recover damages for mental anguish and loss of society upon proper proof thereof, even though there is a surviving parent, spouse, or minor children."

Accordingly, the trial court's finding precluding the grandchildren from being beneficiaries of a wrongful death claim was incorrect. Therefore, plaintiffs' assignment **[***21]** of error is well taken.

For the foregoing reasons, all of defendant Nationwide's and defendant Lightning Rod's assignments of error are overruled, plaintiffs' assignment of error is sustained, and the judgment of the Franklin County Court of Common **[*575]** Pleas is affirmed except as to its holding that the grandchildren are not entitled to recover under the wrongful death statute, and this cause is remanded to that court for modification of the judgment and for further proceedings in accordance with law consistent with this opinion.

Judgment affirmed in part, reversed in part and cause remanded.

Bowman and Petree, JJ., concur.

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[3] Although the syllabus refers to "minor" children, the statute, *R.C. 2125.02(A)(1)*, apparently includes all children since the adjective "minor" does not appear in the statute except with respect to the nature of some of the compensatory damages defined in *R.C. 2125.02(B)*.

[Cite as *In re Estate of Payne*, 2005-Ohio-2391.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In the Matter of: Estate of Jerrod D. Payne,	:	
(Sharma Presley, Administratrix,	:	No. 04AP-1176 (Prob. No. 497840)
Appellant).	:	(REGULAR CALENDAR)

O P I N I O N

Rendered on May 17, 2005

Vickery, Riehl & Alter, and *Mitchell J. Alter,* for appellee Kathy Altizer.

George C. Rogers, for appellant.

APPEAL from the Franklin County Court of Common Pleas, Probate Division.

BRYANT, J.

{¶1} Appellant, Sharma Presley, appeals from a judgment of the Franklin County Court of Common Pleas, Probate Division, and its distribution of wrongful death settlement proceeds. Because the Probate Court erred in its distribution, we reverse.

{¶2} While walking home from school, Jerrod D. Payne, a minor, was killed as a result of being struck by an uninsured motorist. Appellant is decedent's paternal grandmother and was his legal custodian at the time of his death. Appellant filed an uninsured motorist claim with her insurer, Progressive Insurance Company and settled

with Progressive in the amount of $105,000. As administratrix of decedent's estate, appellant presented an application to the Probate Court to approve the settlement.

{¶3} While the matter was pending in the Probate Court, appellee, Kathy Altizer, decedent's maternal aunt, sought to participate in the distribution. Altizer was decedent's legal custodian from 1999 through 2002, as Jerrod's parents had abandoned him. The magistrate found that both appellant and Altizer were "other next of kin" under the wrongful death statute and that both suffered emotional loss as a result of decedent's death. The magistrate recommended that (1) $17,000 go to appellant for the initial shock and trauma of Jerrod's death, including making the funeral arrangements; (2) the party who paid the funeral benefits be reimbursed; and (3) the remaining net proceeds be divided equally between appellant and Altizer.

{¶4} Appellant filed objections to the magistrate's decision, contending the magistrate improperly concluded that Altizer is a "next of kin" for purposes of recovery under Ohio's wrongful death statute. The Probate Court overruled the objections and adopted the magistrate's decision. On appeal, appellant assigns the following error:

> THE PROBATE COURT ERRED IN ITS DETERMINATION THAT A MATERNAL AUNT IS INCLUDED ALONG WITH A PATERNAL GRANDMOTHER (CHILD CUSTODIAN) AS AN OTHER NEXT OF KIN FOR PURPOSES OF RECEIVING A DISTRIBUTION OF WRONGFUL DEATH PROCEEDS RECOVERED FROM THE GRANDMOTHER'S UNINSURED MOTORIST INSURER.

{¶5} The Ohio Supreme Court has stated "[i]n the case of the death of an insured, the settlement proceeds under an uninsured motorist provision are to be distributed among those persons who are entitled by statute to bring a wrongful death action." *In re Reeck* (1986), 21 Ohio St.3d 126, syllabus. An action for wrongful death in

Ohio is purely a creation of statute, subject to the rights and limitations imposed in R.C. 2125.02. *Rubeck v. Huffman* (1978), 54 Ohio St.2d 20. According to R.C. 2125.02(A), an "action for wrongful death shall be brought in the name of the personal representative of the decedent for the exclusive benefit of the surviving spouse, the children, and the parents of the decedent, all of whom are rebuttably presumed to have suffered damages by reason of the wrongful death, and for the exclusive benefit of the other next of kin of the decedent." R.C. 2125.02(A)(1).

{¶6} Here, decedent left no surviving spouse, his parents legally abandoned him and are not entitled to any distribution, and decedent had no children. The narrow issue presented in this appeal is whether the phrase "other next of kin" includes Altizer so that she may recover a portion of the settlement proceeds. Because the issue requires an interpretation of the wrongful death statute, we apply a de novo standard of review. *BP Exploration & Oil, Inc. v. Ohio Dept. of Commerce*, Franklin App. No. 04AP-619, 2005-Ohio-1533.

{¶7} Ohio's wrongful death statute is remedial in nature and is liberally construed to give effect to its purpose. *Ramage v. Central Ohio Emergency Serv., Inc.* (1992), 64 Ohio St.3d 97. Under the statute, the surviving spouse, parents, or children may maintain an action for wrongful death. In addition, other next of kin may maintain an action despite the existence of survivors who maintain a closer relationship to the decedent. *Ramage*, supra; *Senig v. Nationwide Mut. Ins. Co.* (1992), 76 Ohio App.3d 565. Unlike the spouse, children, and parents of the decedent, other next of kin are not rebuttably presumed to have suffered damages by reason of the wrongful death. R.C. 2125.02(A)(1). Rather,

next of kin must prove their damages. Id.; *Ramage*, supra; *Shoemaker v. Crawford* (1991), 78 Ohio App.3d 53, 64.

{¶8} For example, in *Ramage*, the Ohio Supreme Court held the decedent's grandparents were entitled to recover wrongful death compensatory damages for mental anguish and loss of society, even though a surviving spouse, parent, or child may exist. *Ramage*, at 106. The court stated, "[i]n R.C. 2125.02, the General Assembly recognized that the bonds [other next of kin] may enjoy with the decedent may be different from those of the surviving parent, spouse, and minor children, and so provided that other next of kin are not presumed to have suffered damages but must instead prove their damages. We cannot agree with appellants that the General Assembly intended to exclude next of kin simply because another category of survivors exists. To hold otherwise would be contrary to the remedial purposes of the statute." Id. at 105. Similarly, in *Wise v. Timmons* (1992), 64 Ohio St.3d 113, the decedent's siblings were permitted to recover even though decedent's father survived. In *Senig*, this court also allowed grandchildren of the decedent to recover despite surviving children.

{¶9} Appellant acknowledges that other next of kin may recover despite the existence of a closer surviving relative, but contends Ohio has not extended recovery to include aunts, uncles, or cousins. Under civil law rules for the computation of degrees of kinship or consanguinity, parents and children are related in the first degree; grandparents, grandchildren, brothers and sisters are related in the second degree; and aunts, uncles, nieces and nephews are related in the third degree. Ohio Jurisprudence 3d, Decedent's Estates, Section 90-91. According to appellant, if relatives in the second degree exist, such persons as "next of kin," in addition to relatives in the first degree

named in the statute, may bring an action and potentially recover damages to the exclusion of other more remote relatives.

{¶10} By contrast, Altizer argues that any relative is entitled to bring a wrongful death action. According to Altizer, since next of kin are not presumed to have suffered damages, but instead must prove their damages, the potential class of individuals thus is limited and sufficiently protects against "any" relative being entitled to recover.

{¶11} Because R.C. 2125.02 does not define the phrase "next of kin," we must determine its meaning. "The object of judicial investigation in the construction of a statute is to ascertain and give effect to the intent of the law-making body which enacted it." *State v. Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969, ¶11, quoting *Slingluff v. Weaver* (1902), 66 Ohio St. 621. "[T]he intent of the law-makers is to be sought first of all in the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly and distinctly * * * there is no occasion to resort to other means of interpretation. * * * That body should be held to mean what it has plainly expressed, and hence no room is left for construction." *Hairston,* at ¶12. If a term or phrase is not ambiguous, a court must simply apply it. Id. *Benjamin v. Credit General Ins. Co.*, Franklin App. No. 04AP-642, 2005-Ohio-1450, ¶20 ("When a statute conveys a meaning that is clear, unequivocal and definite, the statute must be applied as written").

{¶12} Courts lack the authority to ignore the plain language of a statute under the guise of statutory interpretation or liberal or narrow construction. *Covington v. Airborne Express, Inc.*, Franklin App. No. 03AP-733, 2004-Ohio-6978. Rather, a court must give effect to the words used in the statute, accord the words their usual and customary meaning, and not delete words used or insert words that are not used. *Cleveland Elec.*

Illum. Co. v. Cleveland (1988), 37 Ohio St.3d 50, paragraph three of the syllabus; *Benjamin*, supra.

{¶13} In accordance with the noted rules of construction, we observe that R.C. 2125.02(A)(1) first lists the individuals entitled to recover who are closest in relationship to the decedent: parent(s), child(ren), or a spouse. It further permits recovery "for the exclusive benefit of the other next of kin of the decedent." R.C. 2125.02(A)(1). In its common and ordinary meaning, the phrase "next of kin" is a person's nearest relative or relatives. *Senig*, supra. "Not all kin or relatives of a decedent are '*next* of kin,' regardless of the degree of relationship. Rather * * * the relatives *nearest* to decedent are the 'next of kin.' " (Emphasis sic.) Id. at 574.

{¶14} Ordinarily, then, the "next" of kin to a deceased minor child is the parent or parents. Because, however, the wrongful death statute explicitly provides for parents, children, and spouse and then separately includes "other next of kin," next of kin means the nearest surviving relatives after accounting for the parents, children, or spouse. Ohio cases allowing recovery to relatives with differing degrees of relationships within the same case, such as grandparents and parents, thus are consistent with the plain language of the statute. Were we to hold that "next of kin" includes any degree of relationship to the decedent, such as aunts, uncles, or cousins, we would effectively delete the word "next" from the statute, something a court is not permitted to do. *Benjamin*, supra. Indeed, all of the cases we cite involve the specific individuals listed in the statute and the "next" surviving relatives, which happened to be in the second degree.

{¶15} As a result, Altizer is unpersuasive in contending that because next of kin must prove their damages under the statute, any relative is entitled to bring a wrongful

death action, subject to the need to prove damages. Altizer's argument ignores that the word "next" means the next closest relative after accounting for a surviving spouse, children, or parents. The legislature's mandate that next of kin must prove their damages does not imply that any relative may bring an action; it simply recognizes that even next of kin may not be as close to the decedent as a parent, child, or spouse is presumed to be.

{¶16} Altizer nonetheless contends *Ponser v. St. Paul Fire & Marine Ins. Co.*, 104 Ohio St.3d 621, 2004-Ohio-7105 demonstrates that an aunt is next of kin under the wrongful death statute and entitled to maintain an action. In *Ponser*, the mother, grandparents, and maternal aunt sought to recover uninsured motorist benefits under their respective policies. The maternal aunt maintained her own insurance policy that provided for payment of "compensatory damages as a result of bodily injury suffered by you or a relative and due by law." *Ponser*, at ¶15. The certified conflict question before the Ohio Supreme Court asked whether an insured must file a wrongful death action against a tortfeasor within the two-year statute of limitations set forth in R.C. 2125.02(D) to be legally entitled to recover benefits under the policy. Id. at ¶37.

{¶17} Based on the language in the policies at issue, the court held that the maternal aunt was not required to file a wrongful death action because whether an insured is legally entitled to recover is determined at the time of the accident. Id. Despite the narrow holding in *Ponser*, Altizer asserts that because *Ponser* concluded the maternal aunt was legally entitled to recover under the terms of her insurance policy, a maternal aunt necessarily is included among the persons who are entitled to bring a wrongful death action. *Ponser*, however, is not dispositive of the issues before us.

{¶18} First, the aunt in *Ponser* had her own insurance policy that permitted, under the circumstances set forth in the policy, her recovery of compensatory damages for bodily injury to herself or "a relative." If Altizer has or had such an uninsured/underinsured policy, it was not presented to the court and is not at issue. Second, and more pertinent to the present case, the court in *Ponser* did not address the maternal aunt's status as next of kin for purposes of the wrongful death statute. Instead, the issue was the viability of an uninsured claim pursuant to a contractual insurance policy where the insured had not pursued an action against the tortfeasor.

{¶19} According to the plain, ordinary and clear meaning of the phrase "next of kin," appellant, related in the second degree, is entitled to recover to the exclusion of Altizer, related in the third degree. Appellant is the "next" of kin: the nearest surviving relative to the decedent after accounting for parents, children, or spouse, of which none exist. If the deceased had no surviving relatives of the second degree, Altizer would be the "next" of kin. Because she is not, she is not entitled to any of the proceeds of the settlement at issue. Appellant's single assignment of error is sustained.

{¶20} Having sustained appellant's single assignment of error, we reverse the judgment of the Franklin County Court of Common Pleas, Probate Division, and remand for proceedings consistent with this opinion.

Judgment reversed
and case remanded.

PETREE and McGRATH, JJ., concur.

NOTABLE ARTICLES OF INTEREST

"OTHER NEXT OF KIN" AND "INTERESTED PARTIES" IN WRONGFUL DEATH SETTLEMENTS

By Stephanie R. Kormanec, Esq., Estate Planning & Probate Group, Stark & Knoll Co., L.P.A., and Suzanne M. Gradisher, Esq., Assistant Professor of Business Law, University of Akron

"NEXT OF KIN"

In 2000, *Brinkman et al. v. Doughty et al.*,[1] caused a bit of an uproar for attorneys practicing in the area of wrongful death. The Second District Court of Appeals held in *Brinkman* that R.C. § 2125.02(A)(1)[2] required an administrator to bring a wrongful death action for the exclusive benefit of the decedent's surviving spouse, children, parents, and other next of kin. In *Brinkman*, the siblings and mother of the decedent, who was killed in a motor vehicle, filed a malpractice action against the attorneys who represented the decedent's estate in the underlying wrongful death action.

Despite knowing that the decedent was survived by a mother and siblings, counsel representing the decedent's estate failed to list the decedent's mother and siblings as next of kin on the application to approve the partial wrongful death settlement. Consequently, the decedent's mother and siblings were never notified of the wrongful death settlement, hearings, or the court's approval of the same. Ultimately, the *Brinkman* court held that pursuant to R.C. § 2125.02(A)(1),[3] the person representing the decedent's estate was required to bring a wrongful death action in the name of the decedent for the exclusive benefit of the surviving spouse, children, parents, and other next of kin. The *Brinkman* court further held that R.C. § 2125.02(A)(3)(a)[4] dictates that the decedent's date of death fixes the status of all beneficiaries in an action for wrongful death for purposes of determining the damages suffered.

Brinkman certainly put attorneys on notice of their duty to notify a decedent's surviving spouse, children, parents, and other next of kin in wrongful death settlement proceedings. Unfortunately, the court never defined "other next of kin." As a result, many attorneys, out of fear of being sued for malpractice, have been attempting to notify all the decedent's known kin in wrongful death settlement proceedings. This, of course, is simply impossible to do. Arguably, some attorneys practicing in the area of wrongful death began notifying too many relatives of the decedent.

In *Senig et al. v. Nationwide Mutual Insurance Company et al.*,[5] the court stated that ordinarily, the nearest relatives of a decedent are his or her "other next of kin." Not all kin or relatives of a decedent are "other next of kin," regardless of the degree of relationship. Rather, under this construction, the relatives nearest to decedent are the "next of kin." Thus, "next of kin" includes all blood relatives of the same degree of relationship. For this purpose, the degree of relationship necessarily is determined by counting outward from the decedent rather than downward from a common ancestor."

In 2005, in another case out of the Tenth District Court of Appeals, the court echoed *Senig*,[6] and clearly defined "other next of kin" as that phrase is used in R.C. § 2125.02(A)(1).[7] *In the Matter of the Estate of Jerrod D. Payne*,[8] a grandmother, in her capacity as administrator of her grandson's estate, filed an application to approve a settlement with her insurer for uninsured motorist benefits after her minor grandson was killed by an uninsured motorist.

Prior to his death, the decedent was abandoned by his parents and, at the time of his death, his grandmother was his legal custodian. While the application to approve the settlement was pending before the probate court, the decedent's maternal aunt sought a portion of the settlement distribution.

Interestingly, the magistrate found that the grandmother and aunt were both "other next of kin" under R.C. § 2125.02(A)(1),[9] and that both suffered emotional loss as a result of the decedent's death. The magistrate awarded the grandmother $17,000 for the "initial shock and trauma" of the decedent's death, ordered that the party who paid the funeral expenses be reimbursed, and ordered the remaining assets to be divided equally between the grandmother and the aunt. The probate court adopted the magistrate's decision and the decedent's grandmother appealed.

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On Appeal, the *Payne* court noted that the decedent left no surviving spouse, his parents had legally abandoned him and were not entitled to collect wrongful death proceeds, and decedent had no children. Therefore, the primary issue before the court of appeals was whether the phrase "other next of kin" included the decedent's aunt.

The *Payne* court stated that in its "common and ordinary meaning, the phrase 'next of kin' is a person's nearest relative or relatives." Quoting *Senig*,[10] the Payne court stated "not all kin or relatives of a decedent are 'next' of kin, regardless of the degree of relationship. Rather, *** the relatives nearest to the decedent are the 'next of kin.'"

In fact, Ohio Jurisprudence 3d,[11] echoes the conclusions reached in *Senig* and *Payne*, by stating the following:

> "Under civil law rules for the computation of degrees of kinship or consanguinity, parents and children are related in the first degree; grandparents, grandchildren, brothers and sisters are related in the second degree; and aunts, uncles, nieces and nephews are related in the third degree."[12]

Black's Law Dictionary defines "next of kin" as follows:

1. The person or persons most closely related by blood to a decedent.[13]

Based on the definitions of "next of kin" listed above, if the decedent had grandparents and/or siblings at the time of his death, the grandparents and/or siblings would always be considered "other next of kin." As a result, grandparents and/or siblings, along with the decedent's spouse, children, and parents, would be the only individuals entitled to receive service of notice of any wrongful death settlement applications filed in an Ohio county probate court. If a decedent has no living grandparents or siblings at the time of death, the attorney seeking to have a wrongful death settlement approved on behalf of the decedent's estate would then need to extend out to the decedent's surviving aunts, uncles, nieces, and nephews to determine who constitutes the "other next of kin" under R.C. § 2125.02(A)(1).[14]

Understandably, there remains confusion in the legal community regarding the definition of "other next of kin" as that phrase is used in R.C. § 2125.02(A)(1).[15] Currently, only the courts in *Senig* and *Payne* have specifically defined the phrase "other next of kin." If "other next of kin" truly means any kin, as many county probate courts and attorneys believe, the individuals in a position to claim damages in a wrongful death are numerous indeed. With such a broad definition of "other next of kin," it would be essentially impossible for an attorney representing a decedent's estate to fulfill the burden of notifying all of the decedent's "other next of kin" unless notice was routinely published.

"INTERESTED PARTIES"

Another issue further complicating wrongful death settlements and the identification of those individuals entitled to receive notice is the question of who is an "interested party" under Ohio R. Civ. Proc. 73(E).[16] Seemingly obvious, is the fact that those individuals entitled to receive notice in wrongful death settlement proceedings are the same individuals entitled to receive a distribution in a wrongful death action, as listed in R.C. § 2125.02(A)(1),[17] and further defined in the relevant case law described above. Nevertheless, probate courts and attorneys across Ohio appear to be unclear about who constitutes an "interested party" under Rule 73(E).[18] In fact, there appears to be no consensus about who consitutes an "interested party," for purposes of wrongful death settlement proceedings in the Ohio probate courts.

Generally, procedures utilized in courts, such as notice provisions, are governed by the Ohio Rules of Civil Procedure. However, pursuant to § 5, Article IV[19] of the Ohio Constitution, the Ohio Supreme Court has general powers of superintendence over the courts of Ohio. In exercising these general powers the Ohio Supreme Court has promulgated the Rules of Superintendence for the courts of Ohio. The Rules of Superintendence supplement the Ohio Rules of Civil Procedure. Futher, each common pleas court can adopt its own Local Rules of Court. Accordingly, in order to determine who is entitled to recieve notice of a potential death settlement, one must:

1. Review the Ohio Rules of Civil Procedure: in part, Ohio R. Civ. Proc. 73(A)[20] states that these Rules of Civil Procedure shall apply to proceedings in the probate division of the court of common pleas. Service of notice procedures can be found in Rule 73.[21] Pursuant to Rule

73(E), in any proceeding where any type of notice other than service of summons is required by law or deemed necessary by the court *** notice shall be given in writing and may be served by or on behalf of any interested party. *** [22]

2. Review the Ohio Rules of Superintendence: in part, Ohio Rule of Superintendence, Rule 70(B),[23] provides that the fiduciary shall give written notice of the hearing and a copy of the application to all interested persons who have not waived notice of the hearing.
3. Review the applicable local county probate court rules: There may be as many as 88 different court rules on who is entitled to service of notice.

The issue then becomes what is meant by the phrase "interested party" or "interested person," and how does any such definition impact who is entitled to notice in wrongful death settlement proceedings. The phrase "interested party" is not defined in the Ohio Civil Rules of Procedure. "Interested person" is not defined in the Ohio Rules of Superintendence. Furthermore, neither "interested party" nor "interested person" is used or defined in the wrongful death statute. Also, complicating the matter is the fact that each of Ohio's 88 county probate courts may have different interpretations of which individuals are entitled to notice in wrongful death settlement proceedings. "Interested party/person" can be interpreted broadly to include any person that may have an interest in the decedent's estate, or just those parties listed in the wrongful death statute, namely, the decedent's spouse, children, parents, and other next of kin.

Some county probate courts have not revised Ohio Civil Rule 73 or Ohio Rule of Superintendence 70. Other county probate courts have taken the step of defining the term "interested party" within their local rules, which amend Ohio Rule of Superintendence Rule 70. Below are just a few examples:

- **Butler County: Local Rule 70.1(B)**
  The term "interested parties" who are subject to notice as set forth in R.C. § 2125.02, shall include the surviving spouse, the children and the parents of the decedent or other next of kin who claim to have suffered damages.[24]
- **Clermont County: Local Rule 70.1**
  Interested parties shall be those persons described in section 2125.02(A)(1) RC and shall include not less than two degrees of kinship as computed by the Civil Law...[25]
- **Hamilton County: Local Rule 70.1(B)**
  The term "interested parties" who are subject to notice are those set forth in R.C. § 2125.02.[26]
- **Montgomery County: Local Rule 70.1(B)**
  Interested persons who are subject to notice, as set forth in R.C. § 2125.02, shall include the surviving spouse, the children, the parents, and other next of kin of the decedent.[27]
- **Portage County: Local Rule 70.1(B)**
  Interested Parties Defined: The term "interested parties" who are subject to notice as set forth in Ohio Revised Code 2125.02, shall include the surviving spouse, the children and the parents of the decendent or other next of kin who claim to have suffered damages. [28]

Rather than broadening the term "interested parties" to include anyone who may have a pecuniary interest in the decedent's estate, or any blood relative of the decedent who may have suffered as a result of the decedent's death, the above listed county probate courts are clearly limiting the term "interested parties" to those parties specifically entitled to receive damages under Ohio's wrongful death statute.

CONCLUSION

Currently, in Ohio probate practice, depending on which county probate court the wrongful death suit was filed in, different persons may be required to be served with notice of a wrongful death settlement. As it seems to stand now, who is entitled to notice depends, in part, on whether there is a local rule that amends the Ohio Rule of Superintendence. This is simply not practical. Being mindful of the purpose of Ohio's wrongful death statute, it must be noted that wrongful death proceeds are recovered for exclusive distribution to those beneficiaries designated as such under the Wrongful Death Act, and form no part of the decedent's estate. See *In re Estate of Craig;*[29] *Fogt v. United Ohio Ins. Co.* [30]A wrongful death action is a legal remedy for the exclusive benefit of the beneficiaries listed in R.C § 2125.02(A)(1)[31] and is meant to cover pecuniary and emotional loss suffered by those beneficiaries as a result of the wrongful death.

In light of the above listed case law, it is quite curious why any probate court would interpret "interested party/person" as anybody that may have an interest in the decedent's es-

tate. As noted, wrongful death settlement proceeds are typically not part of a decedent's estate. Therefore, any such settlement proceeds should not be subject to the claims of the decedent's creditors. Rather, it seems logical to conclude that an "interested party" is simply any individual entitled to receive wrongful death settlement proceeds under Ohio's wrongful death statute.

Clarity in this area of the law is necessary so that attorneys will have a proper understanding of those parties entitled to notice in wrongful death settlement proceedings. Currently, attorneys fear being sued for legal malpractice if they fail to notify the "other next of kin" and "interested parties" in wrongful death settlement proceedings. As a result, it is the opinion of the authors that many attorneys are notifying more individuals than necessary under the law, which often unnecessarily complicates the process of having a wrongful death settlement approved in probate court.

If funds recovered by a personal representative in a wrongful death action are intended for the exclusive benefit of the statutory beneficiaries and are not an asset of the decedent's estate, as held in *Craig*[32] then clearly those parties listed in Ohio's wrongful death statutes are the only parties entitled to notice in wrongful death settlement proceedings. At best, the proceeds of a wrongful death claim are "assets" of the decedent's estate for "procedural and accounting purposes only," the award being the actual property of the statutory beneficiaries, which cannot be used to satisfy the decedent's debts as was held in *Fogt*.[33]

Several remedies to this dilemma are possible. First, if the opportunity presents itself, the Ohio Supreme Court (or a lower court, subject to appeal) could specifically define "other next of kin" and "interested parties," as the term "interested parties" is used in Rule of Superintendence 70(B).[34] However, because courts are prohibited from rendering advisory opinions, it would be necessary for this issue to be raised by litigants. To date, the authors are unable to locate any cases where this issue has been litigated before the Ohio Supreme Court. Alternatively, the Ohio Supreme Court could amend Rule of Superintendence 70(B) to limit the definition of "interested persons" to those individuals specifically identified in R.C. § 2125.02(A)(1). Specifically, the court could change the language of Rule 70(B) to read, in pertinent part, "The fiduciary shall give written notice of the hearing (on the proposed wrongful death settlement) and a copy of the application to all interested persons as established within R. C. § 2125.02 ...." Finally, the Ohio Legislature could take the step of codifying the definition of "other next of kin" as that phrase is used in R.C. § 2125.02.

Regardless of which option is pursued, it is clear that until the Ohio Supreme Court and/or Ohio Legislature take some affirmative action to eliminate this confusion, attorneys seeking approval of wrongful death settlements will continue to be subject to potential malpractice claims based upon inconsistent notice requirements within Ohio's 88 common pleas probate courts.

ENDNOTES

1. *Brinkman v. Doughty*, 140 Ohio App. 3d 494, 748 N.E.2d 116 (2d Dist. Clark County 2000).
2. R.C. § 2125.02(A)(1) provides: Except as provided in this division, a civil action for wrongful death shall be brought in the name of the personal representative of the decendent for the exclusive benefit of the surviving spouse, the children, and the parents of the decedent, all of whom are rebuttably presumed to have suffered damages by reason of the wrongful death, and for the exclusive benefit of the other next of kin of the decedent. A parent who abandoned a minor child who is the decedent shall not receive a benefit in a civil action for wrongful death brought under this division.
3. Supra, n. 2.
4. R.C. § 2125.02(A)(3)(a) provides: The date of the decedent's death fixes, subject to division (A)(3)(b) (iii) of this section, the status of all beneficiaries of the civil action for wrongful death for purposes of determining the damages suffered by them and the amount of damages to be awarded. A person who is conceived prior to the decedent's death and who is born alive after the decedent's death is a beneficiary of the action.
5. *Senig v. Nationwide Mut. Ins. Co.*, 76 Ohio App. 3d 565, 602 N.E.2d 438 (10th Dist. Franklin County1992).
6. Supra, n. 5.
7. Supra, n. 2.
8. *In re Estate of Payne*, 2005-Ohio-2391, 2005 WL 1155891 (Ohio Ct. App. 10th Dist. Franklin County 2005).
9. Supra, n. 2.
10. Supra, n. 5.
11. Ohio Jurisprudence 3d, Decedent's Estates, Section 90-91.
12. Supra, n. 8, at ¶ 9.
13. Black's Law Dictionary 1065 (7TH ed. 1999).
14. Supra, n.2.
15. Supra, n. 2.
16. Ohio R. Civ. Proc. 73(E) provides: In any proceeding where any type of notice other than service of summons is required by law or deemed necessary by the court, and the statute providing for notice neither directs nor authorizes the court to direct the manner of its service, notice shall be given in writing and may be served by or on behalf of any interested party without court intervention by one of the following methods***."
17. Supra, n. 2.
18. Ohio R. Civ. Proc. 73(E).
19. Ohio Const. Art. IV, §5(A)
20. Ohio R. Civ. Proc. 73(A).
21. Supra, n. 18.
22. Supra, n. 18.
23. Ohio Sup. R. 70(B) provides: The fiduciary shall givewritten notice of the hearing and a copy of the application to all interested persons who have not waived notice of the hearing. Notwithstanding the waivers and consents of the interested persons, the court shall retain jurisdiction over the settlement, allocations, and distribution of the claims.
24. Butler County Probate Court Local Rule 70.1(B).
25. Clermont County Probate Court Local Rule 70.1.
26. Hamilton County Probate Court Local Rule 70.1(B).
27. Montgomery County Probate Court Local Rule 70.1(B).
28. Portage County Probate Court Local Rule 70.1(B).
29. In re Estate of Craig, 89 Ohio App. 3d 80, 623 N.E.2d 620 (12th Dist. Butler County 1993).
30. Fogt v. United Ohio Ins. Co., 76 Ohio App. 3d 24, 600 N.E.2d 1109 (3d Dist. Shelby County 1991).
31. Supra, n. 2.
32. Supra, n. 29.
33. Supra, n. 30.
34. Ohio Sup. R. 70(B).

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To all counsel who file wrongful death claims in the Lorain County Probate Court:

There has been a lot of confusion over the Probate Court interpretation of the need to include "other next of kin" in wrongful death proceedings. The following process does not apply to distributions on From 14.0 of a survival claim. In order to clear up the confusion, I offer the following:

R.C. § 2125.02 provides:

"a civil action for wrongful death shall be brought in the name of the personal representative of the decedent for the exclusive benefit of the surviving spouse, the children, and the parents of the decedent, all of whom are rebuttably presumed to have suffered damages by reason of the wrongful death, and for the exclusive benefit of the **other next of kin** of the decedent."

Superintendence Rule 70(B) provides:

"The fiduciary shall give written notice of the hearing and a copy of the application to **all interested persons** who have not waived notice of the hearing. Notwithstanding the waivers and consents of the interested persons, the court shall retain jurisdiction over the settlement, allocation, and distribution of the claims."

Civil Rule 19.1 provides:

Compulsory Joinder

"(A) Persons to be joined. A person who is subject to service of process **shall be joined** as a party in the action, except as provided in subdivision (B) of this rule, if the person has an interest in or a claim arising out of the following situations:

(1) Personal injury or property damage to the person or property of the decedent which survives the decedent's death and **a claim for wrongful death** to the same decedent if caused by the same wrongful act;"

In order to give these three provisions any meaning, we are requiring fiduciaries to list the "other next of kin" on Form 14.0 APPLICATION TO APPROVE SETTLEMENT AND DISTRIBUTION OF WRONGFUL DEATH AND SUVIVAL CLAIMS. There is a difference between "kin" and "next of kin". If you are unsure what constitutes "other next of kin" I would ask that you review the decision of *In re Estate of Jorene Harrison*, 2012-Ohio-2169. It contains an excellent discussion on the subject.

The first level of "other next of kin" after children and parents are grandparents, grandchildren and siblings of the decedent. Grandparents, grandchildren and siblings are all second degree relatives of the decedent. Aunts, uncles, nieces, nephews, great-grandparents and great-grandchildren are third degree relatives.

For an example I will use my family tree. I have a wife, three children, two parents and three siblings. I have no grandchildren or grandparents, thus my three siblings would be my only "other next of kin". Thus, if a Form 14.0 were presented to the Probate Court similar to my situation, my wife, children, parents and siblings would all be listed on Form 14.0, along with their respective addresses. They would each either waive service or be served with a notice of the hearing.

If the other next of kin are known and listed on Form 14.0, then they should either waive notice and consent to the settlement and distribution or they should be served with a notice of the hearing.

If the other next of kin are unknown or their residence is unknown, service of process on the other next of kin must be made by service by publication pursuant to Civil Rule 4.4. The Rule provides:

" (1) Except in an action governed by division (A)(2) of this rule, if the residence of a defendant is unknown, service shall be made by publication in actions where such service is authorized by law. Before service by publication can be made, **an affidavit of a party or his counsel** shall be filed with the court. The affidavit shall aver that service of summons cannot be made because the residence of the defendant is unknown to the affiant, all of the efforts made on behalf of the party to ascertain the residence of the defendant, and that the residence of the defendant cannot be ascertained with reasonable diligence."

Whatever information is known about the "other next of kin" should be listed on the reverse side of Form 14.0, such as names, relationship and address. If the other next of kin are unknown, the Form 14.0 should list "Other next of kin unknown" on the reverse side of the Form 14.0.

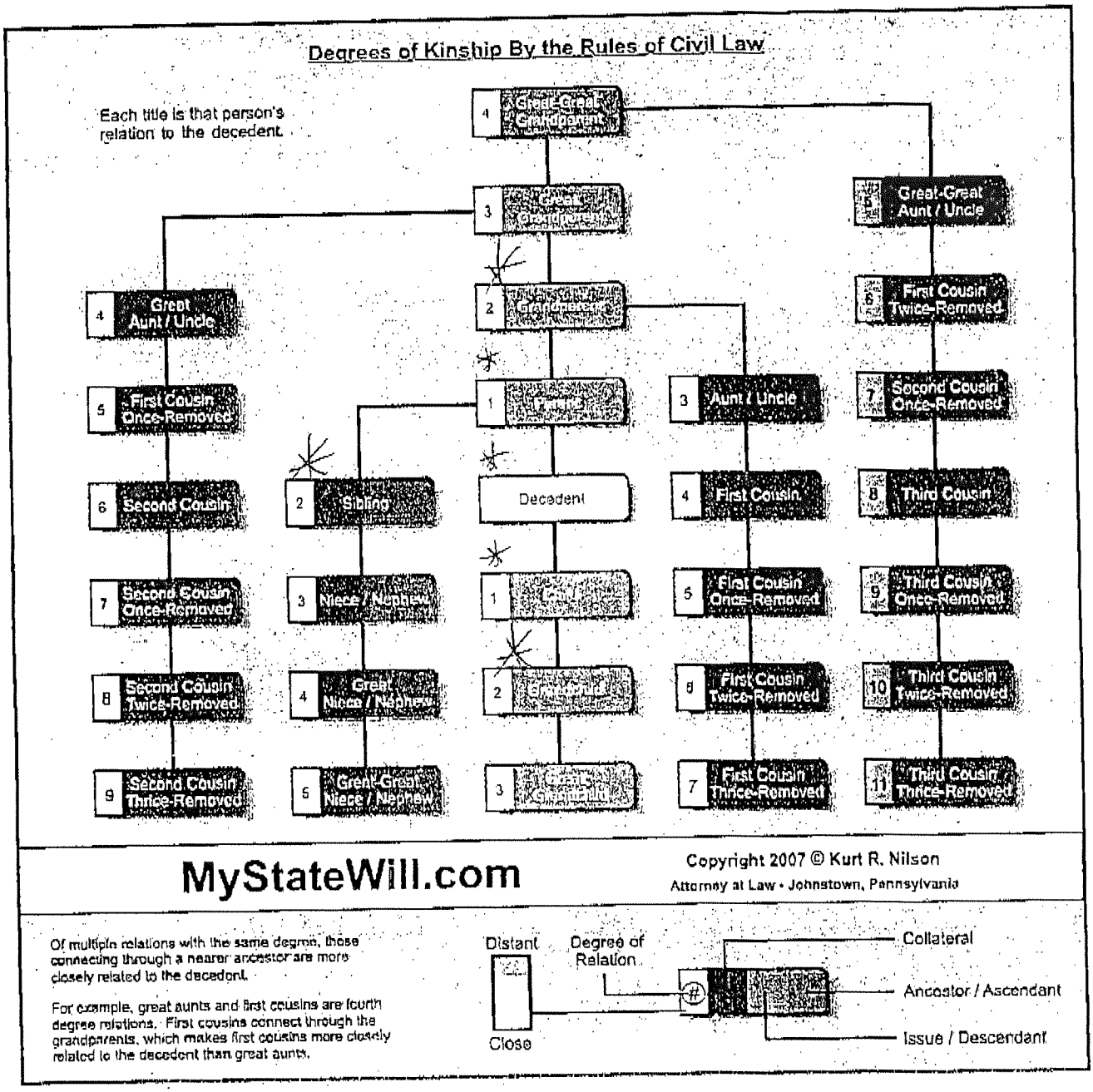
This process must be completed for only for the first APPLICATION TO APPROVE SETTLEMENT AND DISTRIBUTION OF WRONGFUL DEATH AND SUVIVAL CLAIMS. The Court will not require service by publication on subsequent Applications. This happens most often in the asbestos litigation cases, some of which have 15-20 partial applications.

The Court is requiring that on all of the asbestos litigation cases that this process be followed on the cases in which the **Next** application is filed, regardless of how many prior application

have been filed. Again, this process of service by publication will need to be completed only once.

I hope this information has been helpful.

James T. Walther, Judge
Lorain County Probate Court
(440) 329-5443
jwalther@loraincounty.us



Spouse, children, parents must be listed.

then NOK would be Grandchildren + Grandparents if no

if NO grandchildren then go to Siblings.

If you you know who 1 + 2 ~~are~~ are one. you must get

Waivers or serve. If in the 1 or 2 tier if person predece

you do not list. ~~If the~~ their kin.

Copy

Sample

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

IN RE:	)	CASE NO.:
	)	
ESTATE OF	)	APPLICATION FOR SUP. R. 76
	)	EXCEPTION
	)	
	)	

Now comes Kelley & Ferraro, LLP on behalf the Estate of William E. Laschen, and pursuant to Sup. R. 76, requests that this Court grant an exception to the Sup. R. 70(B) service requirement as it pertains to the second degree next-of-kin, and dispense with any further notice upon the same. The reasons for the exception are stated below.

Kelley & Ferraro has not received notice of any loss suffered by the second degree next-of-kin that would warrant deducting the net proceeds allocated to the class of relatives (the surviving spouse) presumed to have suffered a loss in order to redistribute the proceeds to the second degree next-of-kin. As it is, the net amount of $1048.32 to be distributed to the surviving spouse of the decedent (in congruence with the global waiver and consents of all the children of the decedent) is insufficient to adequately compensate the presumed class of beneficiaries listed on the Application for the wrongful death of William E. Laschen.

As such, the Estate respectfully requests an exception to the service requirement as to second degree next-of-kin and to dispense with any further notice upon the same.

Signature block

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

IN RE:

ESTATE OF [redacted] E.
[redacted] SR.

CASE NO.: 1998 ES 00885

ENTRY GRANTING SUP. R. 76 EXCEPTION

This cause came to be heard on this 28 day of Oct., 2014 upon the Application for Sup. R. 76 Exception. On the evidence presented and for good cause shown, the Court finds that said Application is well taken and should be GRANTED.

IT IS SO ORDERED: The service requirement as to second degree next-of-kin is hereby dispensed.

IT IS FURTHER ORDERED: Future service of notice upon second degree next-of-kin is hereby dispensed.

Probate Judge

10/29/14
Date

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Report of the Real Property Law Section Council

To the Council of Delegates:

The Ohio State Bar Association Real Property Law Section Council respectfully requests your favorable consideration of the following proposals:

1. To amend R.C. 2329.02 for the purposes of addressing a common problem in Ohio involving identifying judgment debtors to minimize problems associated with common names, in particular.

2. To modify the Ohio Standards of Title Examination by amending Standards 1.1, 2.3, 3.1, 4.9, 5.4, 8.1, 9.3, 9.5, 10.1, 10.2, and 10.3; to eliminate Standard 5.2, but keep its number as a "placeholder;" to add new Standards 7.3, 11.1, 11.2, 11.3, and 11.4, revise the index, and edit for correction and uniformity. These changes attempt to provide further clarification as to the interchangeable use of the term "marketable record title" and "record marketable title;" revise the proposed form of an attorney certificate or opinion on title primarily to reflect that records of the United States Bankruptcy Court and the United States District Court are only reflected in such certificate or opinion if the real property is located in a county in which such courts are also located; to eliminate a Standard which appeared to have little application; to clarify requirements regarding notice with respect to a summary land sale proceeding; to add a Standard to reflect that proceedings that are not yet final may affect title to real property; to address the concept of "Root of Title" within the Marketable Title Act; to update a reference to the appropriate section of an Ohio Rule of Civil Procedure following amendment; to reflect a change in a civil rule which previously permitted out-of-state service to be completed by the filing of an affidavit of due diligence; to update references to subsections of the Ohio Revised Code in sections applicable to condominiums; to incorporate additional statutory language with respect to condominium drawings; and to make a Standard general neutral. Additionally, new Standards 11.1, 11.2, 11.3, and 11.4 are proposed to address when bankruptcy proceedings may affect title to real property. Finally, a revised index is proposed to address the addition of new Standards; the changes of name of two existing Standards; and to harmonize punctuation; and a final edit of the Standards is proposed to correct typographical errors; to provide for uniform formatting of effective dates and amendment dates of the Standards; and to harmonize references to routinely-mentioned things such as the Ohio Revised Code, the Ohio Marketable Title Act, and "real estate" and "real property." It is not intended that these edits effect any substantive changes to the Standards. The proposed Amendments and new Standards are attached as "Exhibit A." It is further recommended that the Ohio State Bar Association permit the publication of these Title Standards in any publication which does not claim copyright thereto, including, without limitation, Ohio Real Estate Law (Baldwin's Ohio Practice) published by Thomson Reuters and Ohio Real Property Law and Practice, published by Michie/LexisNexis.

Respectfully submitted,

Edward R. Horejs, Jr., *Cleveland*
Chair, Real Property Law Section
Counsel

Proposal 1: To amend R.C. 2329.02 for the purposes of addressing a common problem in Ohio involving identifying judgment debtors to minimize problems associated with common names, in particular.

Over the course of the past year, the Real Property Law Section Council has been reviewing R.C. 2329.02 (sometimes referred to as the Judgment Lien Statute and which will be referred to in this Summary as the "Statute"). In reviewing the Statute, the Real Property Law Section Council Members considered multiple real-life scenarios concerning how the Statute has affected individuals who own real property in Ohio. This review process has encompassed over a year with multiple conference calls and drafts of potential amendments to the Statute that were considered by the Real Property Law Section Council Legislative Drafting Committee and ultimately by the Real Property Law Section Council as a whole.

At the most recent meeting of the Real Property Law Section Council, a Motion was made and unanimously passed, calling for the Ohio State Bar Association to take the lead role advocating for the proposed amendments to the Statute to improve Ohio law.

The Statute currently requires that a certificate of judgment state the following: (1) the court in which a judgment was rendered; (2) the title and number of the action; (3) the names of the judgment creditors; and (4) the names of the judgment debtors. That final requirement, relating to the names of judgment debtors, combined with Ohio's general lien indexing system, leads to what is commonly referred to as the "same-name" identification problem in Ohio real estate transactions, in which individuals are sometimes mistakenly identified as having a lien encumbering their property. That misidentification causes the person affected unnecessary stress and economic hardship, through no fault of their own. Moreover, Ohio real estate lawyers sometimes have to spend time sorting out identity issues, at a point in time which there is a great deal of pressure to resolve the issue due to a pending transaction of some sort.

To address this issue, the Real Property Law Section Council has proposed the foregoing amendment to the Statute that requires additional identifying information concerning individual judgment debtors. The proposed amendment would require relatively minimal additional work for the judgment creditor (or its counsel) to specify the last known address of a judgment debtor – without going so far as to require further inquiry or investigation.

The long-term benefits of this proposed amendment would far outweigh the relatively minimal additional work for a judgment creditor or its counsel. Most importantly, it would help protect innocent consumers and reduce the frequency of these "same-name" problems in the future.

Secondarily, the proposed amendment to the Statute would recognize the updated indexing systems that exists in certain counties by providing for indexing following an instrument number indexing system, rather than book and page.

Attached is the proposed amended Statute that is submitted with the unanimous approval of the members of the Real Property Law Section Council. The Real Property Law Section Council is requesting that the Ohio State Bar Association take steps to amend the Statute to include these improvements to Ohio real property law.

EXHIBIT

PROPOSED STATUTE

R.C. 2329.02 Judgment lien – certificate of judgment – filing – transfer

Any judgment or decree rendered by any court of general jurisdiction, including district courts of the United States, within this state shall be a lien upon lands and tenements of each judgment debtor within any county of this state from the time there is filed in the office of the clerk of the court of common pleas of such county a certificate of such judgment, setting forth the court in which the same was rendered, the title and number of the action, the names of the judgment creditors and judgment debtors, the last known address, without further inquiry or investigation, that is not a P.O. Box, of each judgment debtor, the amount of the judgment and costs, the rate of interest, if the judgment provides for interest, and the date from which such interest accrues, the date of rendition of the judgment, and the volume and page, or instrument number, if any, of the journal entry thereof.

No such judgment or decree shall be a lien upon any lands, whether or not situated within the county in which such judgment is rendered, registered under sections 5309.02 to 5309.98, inclusive, and 5310.01 to 5310.21, inclusive, of the Revised Code, until a certificate under the hand and official seal of the clerk of the court in which the same is entered or of record, stating the date and purport of the judgment, giving the number of the case, the full names of the parties, plaintiff and defendant, the last known address that is not a P.O. Box of each defendant, and the volume and page, or instrument number, of the journal or record in which it is entered, or a certified copy of such judgment, stating such facts, is filed and noted in the office of the county recorder of the county in which the land is situated, and a memorial of the same is entered upon the register of the last certificate of title to the land to be affected.

Such certificate shall be made by the clerk of the court in which the judgment was rendered, under the seal of said court, upon the order of any person in whose favor such judgment was rendered or upon the order of any person claiming under him, and shall be delivered to the party so ordering the same; and the fee therefor shall be taxed in the costs of the action.

When any such certificate is delivered to the clerk of the court of common pleas of any county in this state, the same shall be filed by such clerk, and the clerk shall docket and index it under the names of the judgment creditors and the judgment debtors in a judgment docket or similar record, which shall show as to each judgment all of the matters set forth in such certificate as required by this section. The fee for such filing, docketing, and indexing shall be taxed as increased costs of such judgment upon such judgment docket, or similar record and shall be included in the lien of the judgment.

When the clerk of any court, other than that rendering the judgment, in whose office any such certificate is filed, has docketed and indexed the same, the clerk shall indorse upon such certificate the fact of such filing with the date thereof and the volume and page of the docket entry of such certificate and shall return the same so indorsed to the clerk of the court in which the judgment was rendered, who shall note upon the original docket the fact of the filing of said certificate, showing the county in which the same was filed and the date of such filing. When such certificate is filed, docketed, and indexed in the office of the clerk of the court which rendered the judgment, such clerk shall likewise indorse the certificate and make like notation upon the original docket.

Each such judgment shall be deemed to have been rendered in the county in which is kept the journal of the court rendering the same, in which journal such judgment is entered.

Certificates or certified copies of judgments or decrees of any courts of general jurisdiction, including district courts of the United States, within this state, may be filed, registered, noted, and memorials thereof entered, in the office of the recorder of any county in which is situated land registered under sections 5309.02 to 5309.98, inclusive, and 5310.01 to 5310.21, inclusive, of the Revised Code, for the purpose of making such judgments liens upon such registered land.

Notwithstanding any other provision of the Revised Code, any judgment issued in a court of record may be transferred to any other court of record. Any proceedings for collection may be had on such judgment the same as if it had been issued by the transferee court.

PROPOSAL 2: To modify the Ohio Standards of Title Examination by amending Standards 1.1, 2.3, 3.1, 4.9, 5.4, 8.1, 9.3, 9.5, 10.1, 10.2, and 10.3; to eliminate Standard 5.2, but keep its number as a "placeholder;" to add new Standards 7.3, 11.1, 11.2, 11.3, and 11.4, revise the index, and edit for correction and uniformity. These changes attempt to provide further clarification as to the interchangeable use of the term "marketable record title" and "record marketable title;" revise the proposed form of an attorney certificate or opinion on title primarily to reflect that records of the United States Bankruptcy Court and the United States District Court are only reflected in such certificate or opinion if the real property is located in a county in which such courts are also located; to eliminate a Standard which appeared to have little application; to clarify requirements regarding notice with respect to a summary land sale proceeding; to add a Standard to reflect that proceedings that are not yet final may affect title to real property; to address the concept of "Root of Title" within the Marketable Title Act; to update a reference to the appropriate section of an Ohio Rule of Civil Procedure following amendment; to reflect a change in a civil rule which previously permitted out-of-state service to be completed by the filing of an affidavit of due diligence; to update references to subsections of the Ohio Revised Code in sections applicable to condominiums; to incorporate additional statutory language with respect to condominium drawings; and to make a Standard general neutral. Additionally, new Standards 11.1, 11.2, 11.3, and 11.4 are proposed to address when bankruptcy proceedings may affect title to real property. Finally, an updated foreword is provided and a revised index is proposed to address the addition of new Standards; the changes of name of two existing Standards; and to harmonize punctuation; and a final edit of the Standards is proposed to correct typographical errors; to provide for uniform formatting of effective dates and amendment dates of the Standards;

and to harmonize references to routinely-mentioned things such as the Ohio Revised Code, the Ohio Marketable Title Act, and "real estate" and "real property." It is not intended that these edits effect any substantive changes to the Standards. The proposed Amendments and new Standards are attached as "Exhibit A."

It is further recommended that the Ohio State Bar Association permit the publication of these Title Standards in any publication which does not claim copyright thereto, including, without limitation, Ohio Real Estate Law (Baldwin's Ohio Practice) published by Thomson Reuters and Ohio Real Property Law and Practice, published by Michie/LexisNexis.

EXHIBIT A

Ohio Title Standards

Prepared by the Real Property Law Section of the Ohio State Bar Association.

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Ohio Standards of Title Examination Foreword—2020 Edition

Prepared by the Real Property Law Section of the Ohio State Bar Association

This edition of the Ohio Standards of Title Examination (also commonly referred to as the "Ohio Title Standards") reflects changes and recommendations initiated by the Real Property Law Section Council of the Ohio State Bar Association ("OSBA") through 2020, as adopted by the OSBA Council of Delegates, and approved by the OSBA Board of Governors.

The first edition of the Ohio Standards of Title Examination project was introduced in June of 1951 and thereafter has been a continuous project of the OSBA Real Property Law Section Council.

In June of 2013, the Title Standards Committee of the OSBA Real Property Law Section Council chaired by John M. Liming, Esq., of Defiance, Ohio, determined that rather than continue to update the Ohio Title Standards only on an *ad hoc* basis as occasionally brought to the attention of the Title Standards Committee, an effort should be made to review and, as necessary, revise and update all of the Ohio Title Standards. Shortly thereafter the Committee began holding monthly telephone conferences during which the Title Standards were divided among willing Committee members (comprised of members of the OSBA Real Property Law Section, interested Ohio real estate lawyers, and Ohio title lawyers --all members of the OSBA) and robust discussions occurred. This 2020 edition of the Ohio Title Standards is the result of that seven-year effort. As stated in the first edition of the Ohio Standards of Title Examination:

> The primary purpose of Standards of Title Examination is to promote uniformity of practice pertaining to marketability of titles. The only sanction for the Standards is the attitude of the Bar as a whole; their effectiveness depends upon a general observance. Enforcement through legislative action is believed not to be proper; the inflexibility resulting from incorporation in statutes is thought to be inadvisable. We are convinced that these Standards may be confidently relied upon until amendment is required by subsequent statute or judicial decision. An attorney can be justified as reasonably prudent when following the course approved by this Association.
>
> (*November 1952, First Edition, Ohio Standards of Title Examination*)

The 1952 statement is as relevant today as it was then. As a living document, the Ohio Standards of Title Examination will continue to be reviewed and updated through the efforts of the Title Standards Committee and the OSBA Real Property Law Section Council. The Title Standards Committee relies on input from its members, other members of the OSBA, and the title insurance community. Users of these Standards of Title Examination are encouraged to submit proposals for modifications to the Ohio Title Standards to the Title Standards Committee.

The 1995 edition of the Ohio Standards of Title Examination included the following acknowledgment of the contributions made by the original drafters:

> Thomas J. McDermot (Mansfield), Leon P. Loechler (Columbus), Walter J. Morgan (Cleveland), and Sherman S. Hollander (Cleveland). To the list, I add the name of Dwight Shipley (Columbus). A special thanks is in order for the efforts over the years contributed by Robert L. Hausser (Marietta) who was present at the beginning of this process and continues to serve and contribute today on the subcommittee and the board. The contributions of these men to the practice of real property law in Ohio is significant. The important work that these men initiated and promoted is continued to this day, with your help, by the Real Property Law Section Board of Governors of the Ohio State Bar Association.

The work of the original drafters has continued over the years by the collective contributions of others, including in the undertaking of this 2020 Edition of the Ohio Standards of Title Examination by the following: Charles A. "Chip" Brigham, III; James "Jay" A. Carr II; Douglas A. Daley; Alina Dukstansky; Kevin F. Eichner; Sheila Nolan Gartland; Stephen C. Gregory; Edward R. Horejs, Jr.; Kathryn J. Carlisle-Kesling; Kenton L. Kuehnle; John M. Liming; Donald P. McFadden; G. Scott Miller; Monica E. Russell; and Michael J. Sikora III.

Edward R. Horejs, Jr.
Chair, OSBA Real Property Law Section Council

July 24, 2020

OTS 1.1

~~Prepared by the Real Property Law Section of the Ohio State Bar Association~~

1.1 GENERAL RULES - – MARKETABILITY

Problem A:

What is the general rule as to marketability?

Standard A:

A marketable title is one which a purchaser would be compelled to accept in a suit for specific performance. Objections to a title should not be made ~~by an attorney~~ when the irregularities or defects do not impair the title or cannot reasonably be expected to expose the client to the hazard of adverse claims, litigation or expense in clearing the title.

Comment A:

The Supreme Court states the following in the syllabus of McCarty v. Lingham, 111 Ohio St. 551, 146 N.E. 64 (1924): "A marketable title imports such ownership as insures to the owner the peaceable enjoyment and control of the land as against all others."

See also, *G/GM Real Estate Corp. v. Susse Chalet* Motor *Lodge*, 61 Ohio St. 3d 375, 575 N.E.2D 141 (1991).

Comment B:

See Ohio Revised Code Sections 5301.47 to 5301.56 Ohio's Marketable Title Act (the "MTA").

A "marketable title" is not the same as a "marketable record title," which is defined in Ohio Revised Code Section 5301.47(A) as "* * * a title of record, as indicated in Section 5301.48 of the Revised Code, which operates to extinguish such interests and claims, existing prior to the effective date of the root of title, as are stated in Section 5301.50 of the Revised Code." The MTA uses the term "marketable record title" and "record marketable title" interchangeably.

(~~Effective~~Amended _____, 2020; originally effective November 1, 1952; original c~~C~~omment B added May 20, 1965)

OTS 2.3

2.3 EXAMINATION-~~ – ~~FORM

Problem A:

What should a ~~report~~certificate or opinion on title contain?

Standard A:

The attorney certificate or opinion should include, at a minimum:

(1) The period of time of the examination.

(2) That the certificate or opinion is based on ~~an abstract of~~a title ~~or is based on an~~ examination of the public records of _____ County, Ohio, as disclosed by the ~~public indexes relating to the premises~~ recorded documents affecting title to the real property, including documents filed in the United States District Court and/or the United States Bankruptcy Court if such Courts are located in that County.

(3) That the ~~opinion or~~ certificate or opinion does not purport to cover the following matters: (a) ~~Matters~~ matters not of public record~~,~~; (b) ~~Rights~~ rights of persons in possession~~,~~; (c) ~~Questions~~ questions ~~which~~that a correct survey or inspection of the ~~premises~~ real property would disclose~~,~~; (d) ~~Rights~~ rights to file mechanics~~'~~' liens~~,~~; (e) ~~Special~~ special taxes and assessments not shown by the county ~~treasurer~~'s records, (f) ~~Zoning~~ zoning and other governmental regulations~~,~~; (g) ~~Liens~~ liens asserted by the United States and State of Ohio, their agencies and officers under the Ohio Solid and Hazardous Waste and Disposal Act [~~R.C. §§~~ Ohio Revised Code Sections 3734.21 and 3734.22] and Federal Super Fund Amendments, and under Racketeering Influence and Corrupt Organization ~~acts~~Act and receivership liens, unless the lien is filed in the public records of the ~~County~~ county in which the real property is located; and (h) records of the United States District Court and/or the United States Bankruptcy Court, unless the Court (as applicable) is located in the county in which the real property is located.

(4) ~~An opinion or~~ A certification or opinion that ~~the~~marketable title is vested in ~~by~~ [*identify fee simple or other estate*] in [*insert name of owner*] by the instrument ~~of record, recorded Records, Volume, , Page~~ _____recorded in the _____ Records, [*provide recording information*] of _____ County, Ohio.

(5) That the title is marketable and free from defects and encumbrances except those matters set forth in the certificate or opinion.

(6) Clear and concise language setting forth the defects and encumbrances.

(7) The following basic form of certificate or opinion is suggested:

> The undersigned hereby certifies that ~~he~~the undersigned has made a ~~thorough~~title examination of the records of _____ County, Ohio, as disclosed by the ~~public indexes~~recorded documents affecting title to the real property herein described, including documents filed in the United States District Court and/or the United States Bankruptcy Court if such Courts are located in said County, in accordance with the Ohio ~~Marketable Title Act, relating to premises hereinafter described at Item 1.~~ Title Standards (as promulgated by the Ohio State Bar Association), covering the period from _____, _____ to _____, _____ at _____ [A.M./P.M.]
>
> This certificate does not purport to cover the following: matters not of record in said County~~,~~; ~~including~~ rights of persons in possession~~,~~; questions which a correct survey or inspection would disclose~~,~~; rights to file mechanics~~'~~' liens~~,~~; special taxes and assessments not shown by the county treasurer~~'~~'s, county auditor's or county fiscal officer's records~~,~~; zoning and other governmental regulations or liens asserted by the United States ~~or~~ and State of Ohio, their agencies and officers under the Ohio Solid Hazardous Waste Disposal Act, Federal Superfund Amendments, ~~and under~~ Racketeering Influence and Corrupt Organization ~~Acts~~Act and ~~Receivership Liens~~ receivership liens, unless the lien is filed in the public records of ~~the county in which the property is located~~said County; and records of the United States District Court and/or the United States Bankruptcy Court, unless the Court (as applicable) is located in said County.
>
> The undersigned further certifies that, in ~~his~~the undersigned's opinion based upon said public records, ~~the fee simple title~~ [*identify fee simple or other estate*] title to ~~said premises~~the real property is vested in _____, ~~by a _____ from _____, dated _____~~, [*insert name of owner*] by a [*describe type of instrument*] from [*insert name of grantor*], dated _____, filed for record ~~at _____M.,~~ on [*insert date*] at [A.M./P.M.] and recorded in ~~volume page~~ Volume _____, Page _____ or at Instrument No. _____ of the ~~deed records~~ _____ County, Ohio Recorder; and that, as appears from said records, the title is marketable and free from defects and encumbrances except and subject to the matters set forth herein ~~at Item 2 to inclusive~~.
>
> Dated ~~at _____, Ohio the _____ day of _____, 19 _____~~
>
> _____
> Attorney at Law

(~~Effective as amended~~Amended _____, 2020; amended November 14, 1992; ~~originally~~ amended May 8, 1969; originally effective November 1, 1952)

~~[NOTE: The 1969 amendment by OSBA substituted the words "in accordance with the Ohio Marketable Title Act" for "covering the period from _____, 19____ to the date hereof" in the above paragraph. However, although not formally adopted by OSBA, the phrase "since _____," should be inserted before "as disclosed by" according to a memorandum in the Ohio Bar of July 30, 1979.]~~

OTS 3.1

~~Prepared by the Real Property Law Section of the Ohio State Bar Association~~

3.1 CONVEYANCES- – ACKNOWLEDGMENTS

Problem A:

A deed is executed outside of Ohio without an attached certificate showing authority of the notary public. Should an objection be made to the title?

Standard A:

No.

Comment A:

See generally, Ohio Revised Code Chapter 147 and Ohio Revised Code Section 5301.07.

(~~Effective~~Comment A added _____, 2020; originally effective November 1, 1952)

Problem B:

~~Should an objection be raised because a deed bears the signature of only two witnesses and has certificates of acknowledgments in more than one county of the state?~~

~~Standard B:~~

~~Yes. Proof should be required that the two witnesses were present at the execution in each County.~~

~~(Effective May 21, 1953)~~

(Problem B and Standard B removed _____, 2020)

Problem C:

Is a deed defective because the seal of the officer taking the acknowledgment is omitted ~~or because his term of office has expired~~?

Standard C:

No.

Comment C:

See, Ohio Revised Code Section 5301.071.

(~~Effective~~ Amended and Comment C added _____ __, 2020; originally effective May 21, 1953)

Problem D:

Is a deed defective because the term of office or the officer taking the acknowledgement has expired?

Standard D:

No.

Comment D:

See, Ohio Revised Code Section 147.12.

(Amended and Comment D added _____ __, 2020; originally effective May 21, 1953)

Problem E:

Should a certificate of acknowledgment be deemed sufficient where the acknowledger is ~~described but~~ not specifically named, but is described as (a) "John Doe and his wife" or (b) "personally came the above named grantors"?

Standard ~~D~~E:
Yes.

(~~Effective~~ Amended _____, 2020; originally effective May 19, 1955)

Problem ~~E~~F:

Should the omission of venue from a certificate of acknowledgment render a title unmarketable?

Standard ~~E~~F:

~~Omission~~No, the omission of venue from the certificate does not render ~~the~~ title unmarketable when the authority of the certifying officer can be established by other records.

Comment F:

See generally, Ohio Revised Code Section 5301.07.

(~~Effective as~~Comment F added _____ ____, 2020; amended November 21, 1964; originally effective May 19, 1955)

OTS 4.9

4.9 ENCUMBRANCES- – CURRENT AGRICULTURAL USE VALUATION

Problem A:

Is the ~~title examiner~~ examining attorney under a duty to report that the ~~land~~real property has been certified for ~~Current Agricultural Use Valuation~~current agricultural use valuation for reduced taxation?

Standard A:

Yes.

Comment A:

~~Pursuant to R.C. Sec~~*See*, Ohio Revised Code Section 5713.31 et seq., ~~so long as the owner of farm land annually renews the qualifications for reduction in taxation, no lien arises. However, in any year that the land loses its agricultural tax status, there arises a charge levied upon such land~~under which an owner of real property may file annually an application or a renewal that the real property be valued, for real property tax purposes, at the value such real property has for agricultural use. However, if the real property fails to comply with the statute it may lose the agricultural tax status and become subject to a recoupment in an amount equal to the tax savings during the three preceding tax years. ~~This lien continues upon the title of a subsequent owner. There is no limitation upon the duration of the lien.~~

(~~Effective~~Amended _____ __, 2020; originally effective November 9, 1991)

OTS 5.2

5.2 PROBATE COURT PROCEEDINGS- – DEBTS AFTER FOUR YEARS

~~**Problem A:**~~

~~Should objection be made to the title of a purchaser from the heirs on account of decedent's unpaid debts (a) where the estate had not been administered and more than four years have~~

~~elapsed since decedent's death, or (b) where the final account has not been approved in the administration and more than four years have elapsed since the granting of letters without suit to subject the real estate having been commenced?~~

~~**Standard A:**~~

~~No.~~

~~**Comment A:**~~

~~The rule of this standard is set forth in R.C. Sec. 2117.36. The lien of estate (inheritance) tax is not barred by the four year statute of limitations. R.C. Sec. 2117.06 should also be considered.~~

~~**Advisory Note:**~~

~~This standard has been referred to the Title Standards Committee of the Real Property Section for study and possible revision to conform with the recent amendments to R.C. Sec. 2117.06.~~

~~*(Amended effective November 14, 1992; prior amendment effective May 15, 1991; originally effective May 21, 1953)*~~

***Advisory Note**: This Standard was eliminated effective , 2020. Its number has been retained solely as a "placeholder."*

OTS 5.4

5.4 PROBATE COURT PROCEEDINGS- – SUMMARY LAND SALE

Problem A:

Should an objection be made for failure to give notice of any kind in summary land sale proceedings pursuant to ~~R.C. Sec.~~ Ohio Revised Code Section 2127.11 ~~render the title unmarketable~~?

Standard A:

No~~.~~, as to the service of summons that is set forth in Ohio Revised Code Section 2127.14. However, not all notice requirements are eliminated, as some form of proper notice would need to be given to any party that has an interest in or a lien against the real property, unless such party has waived notice.

Problem B:

Is a summary land sale valid when prosecuted under ~~R.C. Sec.~~ Ohio Revised Code Section 2127.11 by a commissioner appointed by the court as provided by ~~R.C. Sec.~~ Ohio Revised Code Section 2113.03 in estates under $3,000?

Standard B:

No, only an executor or administrator is authorized to institute summary land sale proceedings.

(~~Effective as~~ Amended , 2020; amended January 18, 1991; originally effective May 21, 1953)

OTS 7.3

7.3 COURT PROCEEDINGS—LIS PENDENS

Problem A:

May court proceedings that are not final affect title to real property?

Standard A:

Yes, court proceedings that are not final may affect title to real property if the doctrine of lis pendens applies to those court proceedings. Any interest acquired in real property after lis pendens applies is taken subject to the outcome of the case. *See,* ~~R.C. Sec.~~ Ohio Revised Code Section 2703.26 and interpretive cases.

(Effective , 2020)

OTS 8.1

~~Prepared by the Real Property Law Section of the Ohio State Bar Association~~

8.1 MARKETABLE TITLE ACT- – ROOT OF TITLE

Problem A:

Can a ~~title instrument~~ conveyance or title transaction in the chain of title of a person which otherwise qualifies as a root of title but which results from defective legal proceedings be deemed a proper root of title?

Standard A:

Yes.

Comment A:

It is unnecessary to examine the legal proceedings which form the basis for the conveyance or title i~~nstrument~~ transaction in question.

~~*(Effective November 15, 1969)*~~

~~**Advisory Note:**~~

~~Certain copies of the Title Standards and the two leading treatises on real property in Ohio have a lengthy commentary either preceding Title Standard 8.1 or following it as an appendix. The commentary is deleted as it is felt that sufficient litigation concerning the Marketable Title Act has defined the law in Ohio. Title Standard and Comment remain unchanged, and examiners are cautioned not to rely on any specific number of years for an examination to be complete.~~

(~~Effective~~Amended , 2020; amended November 9, 1991; originally effective November 15, 1969)

OTS 9.3

9.3 OHIO RULES OF CIVIL PROCEDURE- OUT-OF-COUNTY PROCEEDINGS

Problem A:

Should an objection be made to ~~the record~~ a title ~~be made~~ if a certified copy of the proceedings is not filed with the certified copy of the judgment transmitted in accordance with ~~Civil~~ Rule 3(~~F~~G) of the Ohio Rules of Civil Procedure?

Standard A:

Yes.

(Effective , 2020)

OTS 9.5

9.5 OHIO RULES OF CIVIL PROCEDURE- OUT-OF-STATE DEFENDANTS

Problem A:

~~In~~With respect to an action affecting title to real property in which service by publication is authorized by law, when service of summons has been attempted on an alleged out-of-state defendant by certified mail, but the envelope is returned with an endorsement showing failure of delivery, may service be completed by filing an affidavit of due diligence ~~in accordance with Civil Rule 4.3(B)(1)~~?

Standard A:

No.

Comment A:

In such an action under the circumstances described, service should be effected by some other authorized method, including service by publication if the whereabouts of the defendant prove to be unknown. ~~(Civil Rule 4.4(B), amended effective July 1,1971.)~~

Comment B:

Prior to July 1, 2012, Rule 4.3(B) of the Ohio Rules of Civil Procedure permitted service outside the state to be completed by the filing of an affidavit of due diligence when service by certified or express mail was returned showing failure of delivery. Rule 4.3(B) was amended July 1, 2012 to, among other changes, eliminate the provision permitting service outside the state to be completed by the filing of an affidavit when service by certified or express mail is returned showing failure of delivery. The prior version of this Standard did not accept such an affidavit as valid service and the Standard remains unchanged for actions commenced on or after July 1, 2012.

(Amended , 2020; originally ~~E~~effective November 13, 1971)

OTS 10.1

~~Prepared by the Real Property Law Section of the Ohio State Bar Association~~

10.1 CONDOMINIUMS - – BYLAWS

Problem A:

If the bylaws of a condominium are amended must the declaration be amended?

Standard A:

Yes.

Comment A:

The bylaws are attached to the declaration and for the bylaws to be amended, it is necessary to mend the declaration in the manner provided for in the declaration which normally requires the affirmative vote of unit owners exercising not less than 75% of the voting power. (~~R.C.~~ Ohio Revised Code Sections 5311.05(B)(10), 5311.06(A)(2) and 5311.08~~(A)(2)~~(B).)

Problem B:

Must the bylaws be signed, witnessed and acknowledged by the owner?

Standard B:

No.

Comment B:

A true copy of the bylaws must be attached to the declaration. Chapter 5311 of the Ohio Revised Code contains no requirement as to the execution of the bylaws. However, *see* ~~R.C. Sec.~~ Ohio Revised Code Section 5311.05(A) as to the requirements for execution of the declaration.

(~~Effective~~Amended , 2020; amended~~May 20, 1976) (Amended~~ May 13, 2009 to revise statutory references changed by 2004 amendment to the condominium statute; originally effective May 20, 1976)

OTS 10.2 CONDOMUNIUMS- – DRAWINGS

Problem A:

~~R.C.~~ Ohio Revised Code Section 5311.07(B) provides that each drawing shall bear the certified statement of a registered professional surveyor and registered architect or registered professional surveyor and registered professional engineer. May the certified statement be made by one person acting in both of these capacities, if that person is so qualified?

Standard A:

Yes.

Comment A:

If one individual does perform both functions that person's certification should clearly show that he or she is making the statement in both capacities.

Problem B:

Must the drawing show that the building or buildings are substantially completed when the declaration is filed?

Standard B:

Yes, subject to the following comment.

Comment B:

~~R.C.~~ Ohio Revised Code Section 5311.07(B)(1) provides that a registered architect or registered professional engineer certify that the drawings accurately show each building built or constructed. Accordingly, the improvements must be finished to such an extent that the drawings can identify three dimensional boundaries of the cubicles in space comprising the units. ~~R.C.~~ Ohio Revised Code Section 5311.07(D) permits the notation "NOT YET COMPLETED" to indicate improvements "other than units" and only with respect to improvements which have not

been substantially completed. However, such exception is permitted only with respect to improvements which "have been begun".

The drawings for commercial units that do not have wall surfaces shall show the monumental perimeter boundaries of those units. ~~R.C.~~ Ohio Revised Code Section 5311.07(A)(3).

~~(Standards A and B Effective~~ Amended ; amended ~~May 20, 1976)~~ ~~(Amended~~ May 13, 2009 to revise statutory references changed by 2004 amendment to the condominium statute; Standard A and Standard B originally effective May 20, 1976)

Problem C:

Should the drawings show the building or buildings in such detail that the boundaries of the cubicles in space comprising the units can be located and reconstructed therefrom?

Standard C:

Yes.

Comment C:

The detail so required is no more than that required for a proper plat of a boundary survey. A plat of a boundary survey is sufficiently detailed if it can be used to locate and reconstruct the boundaries of the ~~land~~ real property in the field. Similarly, the drawings of the building or buildings are sufficiently detailed in this respect if the three dimensional boundaries of the cubicles in space comprising the units can be located and load bearing walls are shown. ~~R.C. 5311.(A)(4)~~ Ohio Revised Code Section 5311.07(A)(4).

~~(Standard C~~ ~~Effective~~ Amended ; amended ~~November 13, 1976)~~ ~~(Amended~~ May 13, 2009 to reflect the 2004 amendment to the condominium statute; Standard C originally effective November 13, 1976)

OTS 10.3

10.3 CONDOMINIUMS - – DECLARATION

Problem A:

Must the undivided interests in the common elements appertaining to each unit that are set forth in the declaration total one (or one hundred percent)?

Standard A:

Yes

Comment A:

~~R.C.~~ Ohio Revised Code Section 5311.04 provides that the common elements shall be owned by the unit owners as tenants in common and shall remain undivided, that the undivided interest of the units in the common elements shall be those interests set forth in the declaration, and that such interests shall not be altered except by an amendment to the declaration approved by all of the unit owners affected. If such total of such interests equals less than one (or one hundred percent), an interest in the common elements would remain in the declarant after ~~he~~ the declarant no longer owned any of the units. If the total of such interests equals more than one (or one hundred percent), it would be impossible to determine the respective interests of the unit owners in the common elements in the absence of a corrective amendment unanimously approved by the unit owners.

(~~Effective~~Amended ; amended ~~November 13, 1976) (Amended~~ May 13, 2009 to reflect changes made by the 2004 amendment to the condominium statute~~.~~; originally effective November 13, 1976)

OTS 11.1

11.1 BANKRUPTCY – TITLE THROUGH BANKRUPTCY ESTATE

Problem A:

If the chain of title indicates that the real property was conveyed through a bankruptcy proceeding, or is/was subject to a bankruptcy proceeding, should the examining attorney confirm that a grantor had authority to convey the real property?

Standard A:

Yes.

(Effective , 2020)

OTS 11.2

11.2 BANKRUPTCY – TITLE THROUGH FORECLOSURE DURING PENDENCY OF BANKRUPTCY PROCEEDING

Problem A:

Should objection be raised where title is conveyed through a foreclosure proceeding during the pendency of a debtor/defendant's bankruptcy case?

Standard A:

Yes, objection should be raised unless the foreclosure proceeding or the underlying bankruptcy proceeding evidences that: a) the bankruptcy court has granted relief from stay, b) the property has been abandoned, or c) there exists other authority to continue the foreclosure and to convey the property.

Comment A:

If a relief from stay is granted (or if no automatic stay was in effect) and there has not been an abandonment, the bankruptcy trustee must have been named in the foreclosure proceeding.

(*Effective , 2020)*

OTS 11.3

11.3 BANKRUPTCY – PRE-PETITION BANKRUPTCY LIENS

Problem A:

Should an objection to a title be raised when there are liens encumbering the real property that were recorded before a current or former owner of the real property filed a bankruptcy petition?

Standard A:

Yes, an objection to a title should be raised unless the confirmed plan, or the confirmed and completed plan, where applicable, and/or a final, non-appealable order specifically avoiding the liens has been entered by the bankruptcy court.

(Effective , 2020)

OTS 11.4

11.4 BANKRUPTCY – PROPERTY NOT LISTED IN BANKRUPTCY ESTATE

Problem A:

Should an objection to a title be raised when a known bankruptcy case fails to include the real property in the petition?

Standard A:

Yes.

Comment A:

Investigation and assessment should be performed to determine the effect on title due to such failure.

(Effective , 2020)

OTS 1.2

1.2 REFERENCE TO TITLE STANDARDS IN CONTRACTS FOR SALE OR PURCHASE OF ~~LAND~~REAL PROPERTY

An attorney drawing a contract for the sale or purchase of ~~land~~real property should recommend that the terms of the contract provide that marketability be determined in accordance with Title Standards of The Ohio State Bar Association and that the existence of encumbrances and defects, and the effect to be given to any found to exist, be determined in accordance with such standards.

Comment A:

An attorney, drawing a contract for the sale or purchase of ~~land~~real property, should recommend the inclusion of the following language or its equivalent in the contract:

"Marketability of title, if the owner is required to furnish marketable title, shall be determined in accordance with the Title Standards approved by The Ohio State Bar Association."

(Effective November 12, 1960)

OTS 2.1

~~Prepared by the Real Property Law Section of the Ohio State Bar Association~~

1. **2.1 EXAMINATION-– DISCOVERING DEFECT IN TITLE PREVIOUSLY EXAMINED BY ANOTHER**

Problem A:

When an attorney examines a title that is believed to be unmarketable or brings into question whether there is a marketable record title, what steps should be taken if the attorney has knowledge that the same title has been examined by another attorney, and the examining attorney has not objected to the defect?

Should the attorney communicate with the other attorney?

Standard A:

Yes, if practicable, it is recommended that the ~~Attorney~~attorney should communicate with the previous ~~examiner~~examining attorney, explain the matter objected to and an opportunity should be afforded for discussion, explanation, and correction. The attorney contacted should cooperate fully and promptly in investigating his/her records and taking whatever steps are necessary to explain and/or correct the title defect complained of.

(~~Effective as a~~Amended April 28, 2017, originally effective November 1, 1952)

OTS 2.2

2.2 EXAMINATION-~~ ~~– PERIOD

Problem A:

How many years should title be searched in connection with the issuance of a certificate or an opinion of title?

Standard A:

The examining attorney shall confirm that the search period is sufficient to establish marketable title. The search period may vary depending on the purpose of the opinion of title, among other factors. Although the Marketable Title Act (Ohio Revised Code Sections 5301.47 to 5301.56) has several provisions which become operative over a period of 40 years, the Marketable Title Act does not present any length of time for a search period. As such, any references to a period of 40 years in the Marketable Title Act shall not be construed as providing for a 40 year search period for an opinion of title.

(~~Effective as revised,~~ Amended April 27, 2018; original standard had been suspended effective November 15, 1986)

OTS 3.2

3.2 CONVEYANCES-~~ ~~– DESCRIPTIONS

Problem A:

Should an objection be made to ~~the~~ a title because one or more deeds in the chain of title contains an error with respect to the reference to the correct plat book and plat book page of platted l~~and~~real property?

Standard A:

If the deed refers to a subdivision by an exclusive descriptive name, an objection should not be ~~raised~~made because of an error in the reference to the plat book and the plat book page where that subdivision is recorded.

(~~Effective as amended~~Amended April 28, 2017; originally effective November 1, 1952)

Problem B:

Should an objection be made to a title on account of minor typographical errors, irregularities or deficiencies in a description of ~~land~~real property?

Standard B:
Such an objection should not be made when a subsequent conveyance contains a correct description, or when the minor error, irregularity or deficiency is explained by a person with personal knowledge in a suitable affidavit of facts related to title pursuant to Ohio Revised Code Section 5301.252 (B)(4) or (5).

(~~Effective as amended~~Amended April 28, 2017; originally effective May 19, 1955)

Comment B:

Errors, irregularities and deficiencies in real property descriptions in the chain of title do not impair marketability unless, after all circumstances of record are taken into account, a substantial uncertainty exists as to the ~~land~~real property that was intended to be conveyed, or the description falls beneath the minimal requirement of sufficiency and definiteness which is essential to an effective conveyance. Lapse of time, subsequent conveyances, the obvious or typographical nature of errors or omissions, accepted rules of construction and other considerations should be relied upon to approve descriptions that are sufficient to place the world on notice of the precise real property that was intended to be conveyed.

(~~Effective as amended~~Amended April 28, 2017; ~~as~~amended and supplemented November 1960; originally effective May 19, 1955)

Problem C:

If multiple descriptions are provided in a deed, such as a street address, parcel number, and legal description, then which description is controlling?

Standard C:

Legal description.

(~~Originally effective~~Effective April 28, 2017)

OTS 3.3

3.3 CONVEYANCES- – DELIVERY

Problem A:

Should a title be considered unmarketable when it appears from the county records that the grantor died before the deed was filed for record?

Standard A:

Yes, unless waived for lapse of time or unless there is satisfactory proof of delivery before death.

An affidavit of the notary public or the witnesses, if any, of an attorney at law for a party in the transaction, or of other responsible persons who were present at the time of delivery, setting forth specific facts sufficient to confirm the delivery of the deed to the named grantee(s), should be deemed satisfactory proof.

Delivery should be presumed after the deed has been of record for twenty-one years, in the absence of other facts raising a doubt.

Comment A:

See *Kniebbe v. Wade*, 161 Ohio St. 294, 118 N.E. 2d 833 (1954). The *Kniebbe* case was decided after the above standard was adopted.

(~~Effective as amended~~Amended April 28, 2017; Comment A added November 21, 1964; originally effective November 1, 1952~~; Comment A added November 21, 1964~~)

OTS 3.4

3.4 CONVEYANCES-~~–~~ SURVIVORSHIP

Problem A:

What language creates an estate with right of survivorship?

Standard A:

Where the operative words of a deed clearly express an intention to create the right of survivorship, such expressed intention will be given effect and the survivor will take by force of the terms of the grant. Upon the death of the other grantee or grantees, the survivor acquires the entire estate, subject to the charge of ~~death~~estate taxes.

A conveyance is sufficient to create an estate with right of survivorship when it contains "to A and B for their joint lives, remainder to the survivor of them," or substantially similar language. To be sufficient the conveyance should contain the names of the grantees and a reference that the survivor is entitled to the remainder.

Any deed or will containing language that shows a clear intent to create a survivorship tenancy shall be liberally construed to do so. Use of the word "or" between the names of two or more grantees or devisees does not by itself create a survivorship tenancy, but shall be construed and interpreted as if the word "and" had been used between the names. ~~R.C. Sec.~~ Ohio Revised Code Section 5302.20.

Comment A:

Ohio Revised Code Section 5302.20 became effective on April 4, 1983.

(~~Effective as amended~~ Amended April 28, 2017; ~~as~~ amended November 11, 1989; ~~originally adopted November 1, 1952, and~~ amended May 8, 1969; originally effective November 1, 1952)

Problem B:

What shall be sufficient proof of the death of a grantee of a survivorship deed when one or more other grantees set forth in a survivorship deed remain alive?

Standard B:

A certificate of transfer as provided in Section 2113.61 under the Ohio Revised Code or an affidavit accompanied by a certificate of death. For contents of the affidavit see Ohio Revised Code Section 5302.17.

Comment B:

For real property affected by Ohio Revised Code Section 5309.09 (Torrenized Property) the procedure for the transfer of the interest of the decedent shall be pursuant to Section 5309.081 of the Ohio Revised Code.

Problem C:

Does subsequent incompetency of one or more of such owners alter the interests so created?

Standard C:

No.

Comment C:

The incident of survivorship is not destroyed.

(~~Effective as amended~~ Amended April 28, 2017; originally effective November 15, 1969; replaces Problem C of May 21, 1953)

Problem D:

What is the effect of a deed that contains the names of the grantees and a reference that the survivor is entitled to the remainder that does not state the marital status of the grantees?

Standard D:

The failure to cite the grantees' marital status does not make the survivorship tenancy defective.

(Effective April 28, 2017)

OTS 3.5

3.5 CONVEYANCES- – PARTNERSHIPS AND ~~LLCs~~LIMITED LIABILITY COMPANIES

Problem A:

What should be required to show the authority of partners to execute conveyances on behalf of the partnership?

Standard A:

A conveyance from a partnership holding the title is sufficient if it recites that the partners executing it are all the partners, in the absence of information to the contrary. When it does not appear that all the partners executed the conveyance, satisfactory evidence of authority, such as a resolution or a certified copy of a Statement of Partnership Authority pursuant to ~~R.C. Sec.~~ Ohio Revised Code Section 1776.33(D)(2), should be required. Any such evidence of authority should be signed by all the partners in order to be considered satisfactory.

Authority of the partner or partners executing the conveyance should be presumed after it has been of record for five years.

Problem B:

What should be required to show the authority of a person or persons to execute a conveyance on behalf of a limited liability company?

Standard B:

A conveyance from a limited liability company is sufficient if it recites that the member or members executing the conveyance are all the members, in the absence of information to the contrary. When it does not appear that all the members are executing the conveyance, or it the conveyance is executed by a manager or an officer, satisfactory evidence of authority, such as the current operating agreement, resolution, or affidavit should be obtained. Any such evidence of authority should be signed by all the members. Confirmation that the entity is in good standing with the secretary of the state of organization should be obtained.

Authority of the member or members executing the conveyance should be presumed after the conveyance has been of record for five years.

(~~Effective as amended~~Amended April 28, 2017 and April 27, 2018, originally effective November 1, 1952)

OTS 3.6

3.6 CONVEYANCES- – RECITAL OF MARITAL STATUS

Problem A:

After what lapse of time should the omission from a deed of a recital of grantor's marital status not be regarded as a defect?

Standard A:

The omission of such recital is not a defect when the deed has been of record for more than fifty years, in the absence of notice of subsequent facts indicating the contrary.

(Effective November 1, 1952)

Problem B:

Should an objection be ~~raised~~made to a title when the chain of title discloses that the grantor previously had a spouse who did not release dower?

Standard B:

Yes, unless omission of the release is satisfactorily explained.

(Effective May 21, 1953)

Problem C:

Should ~~a title~~an objection be made to a title where the deed recites that the grantor is divorced and the record of the divorce proceedings is not available for examination?

Standard C:

Yes.

(Effective May 21, 1953)

Problem D:

Should the descriptive terms "single," "widow," and "widower," be considered a sufficient showing of marital status?

Standard D:

Yes.

Comment D:

The descriptive term “relict” is not sufficient. The term “divorced” should include the additional descriptive phrase of “and not remarried” to indicate current marital status.

The examining attorney is directed to traditional and long standing legal definitions defining “widow” and “widower” as indicating someone whose spouse is deceased and who has not remarried. If the individual has remarried, current marital status should be indicated.

~~(April 27, 2018)~~

~~(Effective May 19, 1955; as amended~~Amended April 27, 2018; originally effective May 19, 1955)

Problem E:

Where a trust is not otherwise shown by a recorded instrument, should a release of dower be required from the spouse of a person whose name as grantee, in the deed acquiring title, was followed by “trustee,” “as trustee,” “agent,” or words of similar import?

Standard E:

No, where the conveyance from such grantee is to a bona fide purchaser, unless an instrument has been filed by the claiming spouse of such grantee in accordance with Ohio Revised Code Section 2103.021 and if no other instrument containing a description of such ~~land~~real property has been recorded in the office of the recorder of the county in which the ~~land~~ real property is situated which puts upon inquiry any person dealing with such ~~land~~ real property that a spouse of such grantee would have a dower interest in such ~~land~~ real property.

Comment E:

Ohio Revised Code ~~Sec.~~Section 2103.021 provides that the spouse of such grantee has a continued right to a dower interest when such grantee conveys to a bona fide purchaser only if "such spouse, prior to the recording of such conveyance by such grantee to said purchaser, has recorded in the office of the recorder of the county in which the land is situated, an affidavit describing such land and setting forth the nature of such spouse’s interest in such land" and if "no other instrument containing a description of such land~~s~~ has been recorded in the office of the recorder of the county in which ~~the~~ such land is situated which puts upon inquiry any person dealing with such land that a spouse of such grantee would have a dower interest in such land." This statute does not purport to cover conveyances to persons who do not qualify as bona fide purchasers.

Problem F:

What words on an instrument of conveyance are sufficient to indicate that two persons are married to each other?

Standard F:

The descriptive words, "husband and wife," "a married couple," "husband and husband," "wife and wife," or any similar language indicating that two persons are married to each other, regardless of the state in which their union was legally created, shall be sufficient to establish their marital status as married, or as married to one another.

(~~Effective as amended~~Amended April 27, 2018; ~~prior amendment effective as~~ amended November 14, 1992; ~~prior amendment effective~~amended May 20, 1965; prior conflicting standard effective November 17, 1956)

OTS 3.7

3.7 CONVEYANCES-~~ –~~ DATES: OMISSIONS AND INCONSISTENCIES

Problem A:

Shall errors or omissions in the dates of a conveyance or other instrument affecting title, in themselves, impair marketability?

Standard A:

No.

Comment A:

Even if the date of execution is of peculiar significance, an undated instrument will be presumed to have been timely executed if the dates of acknowledgment and recordation, and other circumstances of record, support that presumption.

Inconsistencies in recitals or indications of dates, as between dates of execution, attestation, acknowledgment or recordation, do not, in themselves, impair marketability. Absent a peculiar significance of one of the dates, a proper sequence of formalities will be presumed notwithstanding such inconsistencies.

(~~Effective as amended~~Amended and supplemented November 12, 1960; originally effective November 1, 1952)

OTS 3.8

3.8 CONVEYANCES – VARIANCE OF NAME

Problem A:

When shall a variance between the name of the grantor in a deed and the name of the grantee in the next preceding deed be considered a defect of title?

Standard A:

A slight variance shall not be considered a defect when the variance is not so material as to render the deed outside the chain of title:

(a) when the name of the grantee agrees with the name of the grantor as the latter appears of record in the granting clause, or in the signature, or in the certificate of acknowledgment;

(b) when the variance consists of a commonly recognized abbreviation or derivative;

(c) when the identity of a corporation, partnership, or limited liability company can be inferred with reasonable certainty from the names used and other circumstances of record in the chain of title to the real property, even if the exact name of the entity is not used and slight variations in the name exist from instrument to instrument. Among other variances, addition or omission of the word "the" preceding the name; use or nonuse of the symbol "&" for the word "and"; use or nonuse of abbreviations for "company," "limited," partnership," "corporation" or "incorporated"; and inclusion or omission of all or part of a place or location ordinarily may be ignored. Affidavits and recitals of identity may be used and relied upon to provide evidence of title concerning variances too substantial or too significant to be ignored (Note: This standard pertains to name variations only and Ohio case law should be reviewed and considered to determine whether the particular facts and circumstances of record are such that the variance should not be considered a defect);

(d) when the difference is trivial or the error is apparent on the face of the instrument;

(e) when a middle name or initial is used in one instrument and not in another, unless the ~~examiner~~examining attorney is otherwise put on inquiry that the individuals are different people;

(f) when both instruments have been of record for more than 21 years.

(~~Originally effective November 1, 1952;~~ Amended April 27, 2018; amended and supplemented at various times including May 11, 1967 ~~with additional revisions April 27, 2018~~; originally effective November 1, 1952)

Problem B:

Should an objection be made because a grantor or grantee is designated by a spouse's given name, as "Mrs. John Doe"?

Standard B:

Yes. Evidence as to the person intended by such designation should be required.

(~~Effective as a~~Amended April 27, 2018; amended May 11, 1967; originally effective May 21, 1953)

Problem C:

Should an ~~examiner~~examining attorney rely upon a recital purporting to cure an error in the name of a person or entity in the chain of title?

Standard C:

Yes, unless the variance is so great or unless the other circumstances are such as to create a reasonable doubt of the truth of the recital.

(~~Effective May 21, 1953; Revised~~Amended April 27, 2018; originally effective May 21, 1953)

OTS 3.9

3.9 CONVEYANCES- – POWERS OF ATTORNEY

Problem A:

Is one spouse competent to act for the other under a power of attorney to convey ~~land~~real property or to release dower?

Standard A:

Yes.

Problem B:

Should it be presumed that the principal of a power of attorney was living at the time it was exercised?

Standard B:

Yes, unless circumstances known or appearing of the public record indicate that the principal of a power of attorney was not living at the time the power of attorney was exercised.

Problem C:
If a power of attorney includes a statement that the power of attorney becomes effective only upon the occurrence of a specified event, such as the disability or incapacity or adjudged incompetency of the principal as provided in ~~R.C. Sec.~~ Ohio Revised Code Section 1337.09, should proof of the occurrence of the contingency be required?

Standard C:

Yes, if the instrument provides for the happening of a contingency, proof of that contingent event should be required and recorded.

Problem D:

Should an objection be made to a title if a general power of attorney is not executed as of a recent date?

Standard D:

No, if the general power of attorney sets forth a durability clause or if the durability is presumed under the provisions of any applicable law.

(*~~Problem C and Standard C added effective November 11, 1989;~~ Problem D and Standard D ~~added~~ effective April 27, 2018; Problem C and Standard C effective November 11, 1989, originally effective May 19, 1955*)

OTS 3.10

3.10 CONVEYANCES~~-~~ – BY EXECUTOR OR OTHER FIDUCIARY

Problem A:

Can an executor validly convey title, under an express power of sale in the will, immediately after the admission of the will to probate and the filing of the certificate of service required under ~~R.C. Sec.~~Ohio Revised Code Section 2107.19?

Standard A:

Yes, when conveyed in good faith and provided proceedings to contest the will have not been commenced and assuming no rights of spouse under ~~R.C. Sec.~~Ohio Revised Code Section 2106.16 have been exercised, at the date the deed is delivered. Good faith is ordinarily presumed.

Comment A:

~~R.C. Sec.~~Ohio Revised Code Section 2113.39 makes clear that a power of sale authorizes a sale for any purpose considered by the executor to be in the best interest of the estate unless the power is expressly limited by the will. ~~R.C. Sec.~~Ohio Revised Code Section 2113.23 provides that, notwithstanding any subsequent revocation of authority or removal of the executor, all previous sales made lawfully and in good faith by the executor and with good faith of the purchaser shall be valid as to such executor and purchaser.

(~~As amended~~Amended April 27, 2018~~. Originally effective November 1, 1952, and amended May 18, 1972, and~~ ; amended May 18, 1994; amended May 18, 1972; originally effective November 1, 1952)

Problem B:

Is a conveyance defective because a fiduciary signs and acknowledges as an individual?

Standard B:

No. *See*, ~~R.C. See.~~Ohio Revised Code Section 5301.071(D)

(~~As amended~~Amended April 27, 2018~~. Originally~~; originally effective May 21, 1953)

OTS 3.11

3.11 CONVEYANCES~~-~~ – FROM CORPORATION

Problem A:

When should the authority and identity of officers of a corporation to execute a corporate deed not be questioned?

Standard A:

The authority and identity should not be questioned when the deed is executed by an officer, in the absence of known facts creating a doubt. This standard is not intended to apply to the requirements of an attorney for the purchaser from a corporation or an attorney for such a purchaser's mortgage lender at the time of the closing of the purchase or the loan.

(~~Effective as amended~~Amended November 11, 1972; prior inconsistent ~~Standard~~standard first effective November 1, 1952 and amended at various times)

Problem B:

Is a corporate deed sufficiently executed where the name of the corporation does not appear in the signature or certificate of acknowledgment?

Standard B:

The title is not unmarketable where the deed appears to be signed and acknowledged by the corporate officers if the deed as a whole purports to be that of the corporation.

(Effective May 19, 1955)

Problem C:

When should a corporate existence (either foreign or domestic) not be questioned?

Standard C:

Where an instrument of a corporation appears in the title, the ~~examiner~~examining attorney should, if it is an Ohio corporation (or incorporated in another state which has easily accessible records which are free or available at nominal cost) determine if the corporation was legally in existence at the time of the conveyance. If such corporation was not in existence at such time, the ramifications should be determined with reference to ~~chapter~~Chapter 1701 of the Ohio ~~revised code~~ Revised Code (or similar provisions of the law of the state of incorporation). If the corporation's existence cannot be determined as of the date of the instrument, and the instrument has been of record for a period of at least seven years, and the instrument is executed in proper form, the ~~examiner~~examining attorney may assume that the corporation was legally in existence at the time the instrument took effect.

(~~Effective May 11, 1967 and revised~~Amended April 27, 2018; originally effective May 11, 1967)

OTS 3.12

3.12 CONVEYANCES- – RIGHT TO PURCHASE

Problem A:

When should a recital, contained in an instrument in the chain of title, of a right to purchase under a contract by a person otherwise a stranger to the title, no longer be considered a cloud?

Standard A:

After the instrument containing the recital has been of record for 15 years, provided the ~~land~~real property has been apparently conveyed to a bona fide purchaser since the date of such instrument.

(Effective May 19, 1955)

OTS 3.13

3.13 CONVEYANCES- – DEED FROM STRANGER

Problem A:

Is a cloud on title created by a deed or encumbrance from a stranger to ~~the~~ record title?

Standard A:

A stray deed or other interloping instrument does not create a cloud on the title unless its recitals or other known circumstances are sufficient to put a purchaser on inquiry. Other known circumstances should include the passage of time and consideration of the Ohio Marketable Title Act (~~R.C. Sec.~~Ohio Revised Code Sections 5301.47 ~~et seq.~~to 5301.56).

Comment A:

The ~~examiner~~examining attorney must consider the possible application of the Ohio Marketable Title Act, under which a stray deed can become the "root of title" to a competing chain of record title that is superior to the chain of transactions being searched.

(~~Effective as amended~~Amended May 15, 1991; originally effective May 19, 1955)

OTS 3.14

3.14 CONVEYANCES~~-~~ – DEEDS SUBSEQUENT TO MORTGAGE

Problem A:

Is a mortgage still considered to be an encumbrance on the title when, after the mortgage is recorded, the mortgagor conveys fee simple title of the real property to the mortgagee?

Standard A:

No, unless the mortgage or the deed conveying title to the mortgagee indicates that a merger of title will not occur.

(~~Effective as amended~~Amended April 27, 2018; originally effective May 19, 1955)

OTS 3.15

3.15 CONVEYANCES – QUIT CLAIM DEEDS

Problem A:

Does the fact that a conveyance necessary to the chain of title, including the conveyance to the proposed grantor, is a quit claim deed impair marketability or necessitate inquiry or corrective action?

Standard A:

No.

(Effective November 12, 1960)

OTS 3.17

3.17 CONVEYANCES- – BY HEIRS OR DEVISEES

Problem A:

Does the fact that a decedent's estate has not been closed prevent his heirs or devisees, whose title is evidenced by a certificate of transfer, from conveying good title?

Standard A:

No, provided the time period for will contests and presentation of claims has passed and provided any estate or inheritance tax liens to which the estate is subject are either discharged or the real property in question released therefrom, and provided one or more partial accounts of the fiduciary have been approved which appear to show payment of all claims against the estate or releases of the claims are filed.

Comment A:

If decedent has been dead more than ten years, any estate tax liens will have expired. ~~R.C.~~ Ohio Revised Code Section 5731.38 (Ohio Estate Tax) and Sec. 6324(a)(I)~~. Int. Rev.~~of the Internal Revenue Code (Federal Estate Tax). If administration proceedings have been pending four years or more, consideration should be given to the potential effect of ~~R.C.~~Ohio Revised Code Section 2117.36, with respect to claims against the estate.

Depending on the circumstances of the particular case, other things may sometimes prevent the heirs or devisees from conveying good title, for example a pending or possible adversary proceeding, a statutory bar to taking an inheritance or devise, an unresolved question concerning the identity of the heirs or devisees, one or more competing rights of the surviving spouse, or unpaid legacies which are a charge against the real property in question.

(~~Effective as amended~~Amended April 27, 2018; originally effective May 11, 1967)

OTS 3.18

3.18 UNRECORDED DISCLOSED TRUSTS

Problem A:

Should an objection be made to a title dependent upon a disclosed trust not of record?

Standard A:

Yes, unless there is placed of record either (1) excerpts of the operative provisions of the trust agreement, together with an affidavit that it is a true copy of the text in the trust agreement, or (2) a Memorandum of Trust in conformity with the requirements of ~~R.C.~~Ohio Revised Code Section 5301.255. (~~R.C.~~Ohio Revised Code Section 5301.01, effective August 10, 1994; ~~R.C.~~Ohio Revised Code Section 5301.255, effective, as amended, January 17, 2008).

Comment A:

A disclosed trust is one in which some identifying information about the trust beyond the word "Trustee" or "Agent" is used to indicate that the real property is held in trust. (O~~RC 5301.03~~ Ohio Revised Code Section 5301.03, effective 10/1/1953).

(~~Effective~~Amended May 10, 2019; ~~originally amended May 18, 1995 and~~ amended May 13, 2009; amended May 18, 1995; originally effective November 15, 1986)

OTS 3.19

3.19 RE-RECORDING OF DEFECTIVE DEED, AFTER CORRECTIONS

Problem A:

Under what circumstances may a deed containing errors of content or execution be corrected and re-recorded, and be acceptable for clearing of title?

Standard A:

The answer depends on the nature of the defect and whether the deed is acknowledged before recording. A change made to alter the substance of the document is ineffective.

Whenever a document is re-recorded to make a correction, the re-recorded document should contain on the face of the document a statement of the changes that were made.

Comment A:

The following are examples of changes that are permissible without a reacknowledgement by the grantor: to correct a spelling or to add an initial in the name of the grantor who was in title or an initial of the name of the intended grantee; to show the correct tax-mailing address of the grantee; to make a correction in the address or the tax parcel number of the subject real ~~estate~~property to conform such information to the legal description; to correct a minor defect in the attestation or acknowledgment.

If a grantor reacknowledges the instrument before it is recorded, then a more significant error or omission may be corrected, such as a missing marital status may be recited, or a correction may be made to correct serious errors or omissions in a legal description.

In the event that an instrument erroneously conveys an interest owned by a grantor to a grantee, a corrective deed, even if reacknowledged, is insufficient to correct the error. The following are examples of changes that are impermissible and cannot be corrected by re-recording a prior document: to add or delete a grantee; to make substantive changes in the legal description — for example: Lot 1 conveyed, whereas Lot 11 intended to be conveyed; to add or delete restrictive covenants or easements.

Particular circumstances may alter generalities. A grantee may not confer good title on himself or herself by adding or deleting a few words to a deed and recording it; nor may a grantor diminish (although he or she may augment) a title previously conveyed.

(~~Effective~~Amended May 10, 2019; originally effective May 18, 1994)

OTS 4.1

4.1 ENCUMBRANCES- – COURT COSTS

Problem A:

When should an objection be made to a title because of unpaid court costs assessed against one or more owners in the chain of title?

Standard A:

An objection should be made only when such unpaid costs are a lien.

Comment A:

Court costs are a lien only when execution has been duly levied on the real property or when a certificate of judgment has been filed during the judgment debtor's ownership of the real property.

(Effective November 1, ~~1952~~1952)

OTS 4.2

4.2 ENCUMBRANCES- – ESTATE TAX

Problem A:

Is a decedent's real property divested of the lien of the state estate tax by a conveyance by an executor acting pursuant to a testamentary power of sale?

Standard A:

Yes, provided the conveyance is to a bona fide purchaser for an adequate consideration.

Comment A:

See ~~R.C. Sec.~~Ohio Revised Code Section 5731.02 (A) as amended, the levy of an estate tax is limited to persons dying on or after July 1, 1968 and before January 1, 2013. Further, the lien is

divested generally after ten years from the date of decedent's death. ~~R.C. Sec.~~Ohio Revised Code Section 5731.38.

(~~As amended~~Amended May 10, ~~2019. Originally effective May 21, 1953 and~~2019; amended November 11, 1972 and at various times; originally effective May 21, 1953)

Problem B:

Should a title be considered unmarketable in the hands of a purchaser, encumbrancer or lessee for value, as disclosed by the record, whose grantor acquired title by gift, the donor of which gift survived the gift by more than three years?

Standard B:

No. *See* ~~R.C. Sec.~~Ohio Revised Code Section 5731.05 (C) (1).

(~~Effective as amended~~Amended May 10, 2019; amended November 13, 1971; originally effective November 16, 1957~~ and amended November 13, 1971~~)

OTS 4.3

4.3 ENCUMBRANCES~~-~~ – RELEASE BY ATTORNEY

Problem A:

Does the attorney for a judgment creditor have implied authority to release specific ~~land~~real property for a lien, or to satisfy the judgment upon partial payment, or to assign the judgment?

Standard A:

Only the judgment creditor may assign, waive or partially release the judgment. The attorney may release the judgment only if the judgment is paid in full. An attorney for a judgment creditor by reason of the limited agency relating to the case, cannot, without specific authority from his client, assign, waive or partially release the judgment. See *Card v. Walbridge*, 18 Ohio 411 (1849); *Wilson, et al. v. Jennings, et al.*, 3 Ohio St. 528 (1854), *Beard v. Westerman*, 32 Ohio St. 29 (1876); *Countee v. Armstrong*, 9 Dec. Rep. 62 (1876); *Holdon v. Lippert*, 4 O.C.D. 527, 12 C.R. 767 (1894); and *Harrison v. Kirk Bride*, 16 O.D. 389 (1883).

(~~Effective as amended~~Amended November 16, 1957; originally effective May 21, 1953)

OTS 4.4

4.4 ENCUMBRANCES~~-~~ – LEASES

Problem A:

May an ~~examiner~~examining attorney omit from the ~~examiner~~examining attorney's opinion a reference to a recorded lease, other than a coal lease or an oil and gas lease, when the term expressed in the lease has expired?

Standard A:

Yes, in the absence of notice of renewal arising from possession, instruments of record, or otherwise.

(~~Effective as amended~~Amended May 10, 2019; originally effective November 12, 1960)

Problem B:

Should a coal lease or an oil and gas lease be shown even if satisfactory evidence is furnished that rentals are in default and that minerals are not being produced?

Standard B:

Yes.

Comment B:

As to oil and gas leases, *see* ~~R.C. Sec.~~Ohio Revised Code Section 5301.332.

(~~Effective as amended~~Amended May 10, 2019; ~~previously~~ amended ~~effective~~ May 20, 1965; originally effective May 21, 1953).

OTS 4.5

4.5 ENCUMBRANCES~~-~~ – FORECLOSED MORTGAGES

Problem A:

Should any record of a mortgage release in the office of the ~~County Recorder~~county recorder be required when the mortgaged ~~land~~real property has been conveyed pursuant to a proper foreclosure sale?

Standard A:

No.

(Effective May 21, 1953)

Problem B:

Should a title to real ~~estate~~property be considered unmarketable if any lien thereon has been judicially extinguished but no record of its cancellation has been noted on the record of such lien?

Standard B:

No. The ~~examiner~~examining attorney is, however, reminded of the Federal right of redemption pursuant to 28 ~~U.S.C.~~§United States Code Section 2410(c), which provides, in pertinent part, as follows:

> Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem, except that with respect to a lien arising under internal revenue laws, the period shall be 120 days or the period allowable for redemption under state law, whichever is longer...

to which reference should be made.

(~~Effective May 16, 1957. Standard B was amended September 1999~~1999; originally effective May 16, 1957)

OTS 4.6

4.6 ENCUMBRANCES- – JUDGMENT AGAINST HEIRS

Problem A:

Where a will authorizes the executor to sell real ~~estate~~property and sale is made pursuant to such power, do judgments against the heirs or devisees affect the marketability of title to the ~~land~~real property so sold?

Standard A:

No.

(Effective November 12, 1960)

OTS 4.7

4.7 ENCUMBRANCES- – BUILDING AND USE RESTRICTIONS WITH FORFEITURE PROVISIONS

Problem A:

After what period of time should a breach of a building and use condition or restriction which entails a forfeiture of title be disregarded?

Standard A:

If the condition or restriction remains valid under the Ohio Marketable Title Act (Ohio Revised Code Sections 5301.47 to 5301.56), an objection should be made.

(~~Effective as amended~~Amended May 10, 2019; originally effective November 12, 1960)

OTS 4.8

4.8 ENCUMBRANCES – SUBSCIPTION OF SUBDIVISION PLAT BY LIEN HOLDERS

Problem A:

Is the statutory dedication of a subdivision plat affected by the failure of lien holders to join in the dedication?

Standard A:

No.

Comment A:

The rights of ~~the~~lien holders continue unaffected by the platting and dedication. As such, any rights of the landowner in and to the real property that are dependent upon the plat and the dedication thereof are subordinate to the lien(s).

(~~Effective as amended~~Amended May 10, 2019; originally effective May 8, 1969)

OTS 4.10

4.10 ENCUMBRANCES- – MORTGAGE RELEASE BY CORPORATION

Problem A:

When should the authority and identity of a person or persons executing a mortgage release on behalf of a corporate mortgagee be questioned?

Standard A:

The authority and identity should not be questioned in the absence of known facts creating a doubt.

(Effective May 9, ~~2001.~~2001)

OTS 4.11

4.11 ENCUMBRANCES- – RELEASE OF RE-RECORDED MORTGAGES

Problem A:

When a mortgage has been re-recorded and there is a valid release by separate instrument of record making reference to the volume and page of either of the original recording or of the re-recording of the mortgage, but not both, should the mortgage be treated as having been properly released?

Standard A:

Yes, but only if such release was recorded after the re-recording of the mortgage.

Comment A:

Mortgages are re-recorded to correct clerical or scrivener's errors, and re-recording does not alter, amend or otherwise change the obligations of the mortgagors under the mortgage. Historically, mortgages were often released by marginal notation, which clearly indicated the mortgagee's intention to release the mortgage as recorded, and as re-recorded, since the notation of release was on the original instrument. Now, pursuant to ~~R.C.~~Ohio Revised Code Section 5301.28, county recorders may, and frequently do, require that all releases of mortgages be made by separate instrument. Those separate instruments may, in error, fail to reference the original volume and page of recording of the mortgage and/or the volumes and pages of any re-recordings thereof. Such defects in releases of mortgages being made by separate instruments do not cause the subject real ~~estate~~property to be considered unmarketable and an ~~examiner~~examining attorney may omit from ~~his~~the examining attorney's opinion reference to any such re-recorded mortgage if: (a) a release of mortgage by separate instrument correctly references either the volume and page of the recording or of any re-recording thereof, and (2) such release was recorded after all re-recordings of the mortgage. If the release was recorded before the mortgage was re-recorded, the re-recording of the mortgage may constitute an attempt by the mortgagee to assert a mortgage canceled in error, and in such an instance the re-recorded mortgage should still be identified as an encumbrance against the real property.

(Effective November 7, ~~2003.~~2003)

OTS 4.12

4.12 ENCUMBRANCES – ASSIGNMENT OF RENTS AND LEASES

Problem A:

When an assignment of rents and/or leases instrument has been recorded contemporaneously with a mortgage and the mortgage has been cancelled or released of record but not the corresponding assignment of rents or leases, should the assignment of rents and/or leases be treated as having been released?

Standard A:

Yes, unless other facts in the recorded instruments indicate a contrary intention and only if such release was recorded after the recording of the assignment of rents and/or leases and the legal description for the corresponding mortgage describes the same real property set forth in the assignment of rents and/or leases.

(Effective May 10, 2019)

OTS 5.1

~~Prepared by the Real Property Law Section of the Ohio State Bar Association~~

5.1 PROBATE COURT PROCEEDINGS- – INVENTORY

Problem A:

Does omission of the real ~~estate~~property from the inventory and appraisement cast a cloud on ~~the~~a title?

Standard A:

No, such omission standing alone does not affect marketability.

(Effective November 1, 1952)

OTS 5.3

5.3 PROBATE COURT PROCEEDINGS- – CERTIFICATES OF TRANSFER

Problem A:

Do errors in a certificate of transfer from probate court affect the title?

Standard A:

No. Objections on account of errors in a certificate of transfer should not be made (a) unless the errors are such as to cause future difficulties to a client in obtaining a transfer on the real ~~estate~~property tax records, or (b) unless the terms of the certificate raise a reasonable doubt of the facts of ownership shown by other records of title.

(~~Effective as amended~~Amended May 10, 2019; originally effective May 21, 1953)

OTS 5.5

5.5 PROBATE COURT PROCEEDINGS- – RECORDING OF OUT-OF-COUNTY PROCEEDINGS

Problem A:

If administration proceedings in an Ohio estate are not admitted to record in the county where the real property is situated, should an objection be made to ~~the~~a title evidenced by a certificate of transfer, or a deed of the executor or administrator of such out-of-county proceedings?

Standard A:

Yes.

Comment A:

Before a title can be considered to be marketable~~ of record~~, it is necessary to admit to record in the probate court of the county where the real property is situated at least those portions of the out-of-county proceedings which are necessary to show that the title which was derived through such deed or as noticed by such certificate of transfer was at the time in question duly authorized, and with respect to any such deed, the executor or administrator was duly appointed, qualified, and acting in the fiduciary capacity described in the deed. As a general matter, those portions of the proceedings necessary to evidence authority for a certificate of transfer or for the executor or administrator include authenticated copies of the admission to probate with copy of the will, if testate, pursuant to ~~R.C. Sec.~~Ohio Revised Code Section 2107.21 and the appointment of the executor or administrator. In the absence of a testamentary power of sale or an administrator when there is no will annexed with power of sale, there should also be an appropriate order of court authorizing the sale by the fiduciary, or a power of sale by written consent pursuant to ~~R.C. Sec.~~Ohio Revised Code Section 2127.011.

(~~Effective as amended~~Amended May 10, 2019; amended November 13, 1971; prior conflicting ~~Standard~~standard effective May 11, 1967)

OTS 5.6

5.6 PROBATE COURT PROCEEDINGS- – MENTAL ILLNESS PROCEEDINGS

Problem A:

Where the indices of a probate court contain a notation of the name of a person in the chain of title to real property but no disclosure of the person's status is available because of ~~R.C. Sec.~~Ohio Revised Code Section 5122.31, or any similar provision, should such notation alone cause an objection to be made as to the competency of such persons?

Standard A:

No.

Comment A:

Unless it affirmatively appears from the information disclosed, or permitted to be disclosed without a formal court order, that the probate court has denied or removed such person's rights to contract or other "civil rights" either in whole or in part, including the right to convey or contract for the conveyance of real property, an index notation alone is not sufficient information upon which to base an objection.

(Effective May 12, 1983)

OTS 6.1

~~Prepared by the Real Property Law Section of the Ohio State Bar Association~~

6.1 PROCESS- – SERVICE BY PUBLICATION WHEN NAME AND ADDRESS OF DEFENDANT ARE UNKNOWN

Problem A:

Where both the name and residence of a defendant are unknown to the plaintiff, must the ~~Plaintiff~~plaintiff seek a court order respecting the publication of notice in addition to the affidavit required in Ohio Rule of Civil ~~Rules~~Procedure 4.4?

Standard A:

Yes. Rule 4.4(~~a~~A) of the Ohio Rules of Civil Procedure (adopted July 1, 1970) did not overrule ~~R.C. Sec.~~ Ohio Revised Code Section 2703.24 (amended effective October 4, 1955), which requires that, when it appears by affidavit that the name and residence of a necessary party are unknown to the plaintiff, the court shall make an order respecting the publication of notice.

(~~Substitute Standard effective as amended~~Amended May 15, 1991; originally effective November 17, 1956. Original ~~Standard~~standard has been incorporated in Civil Rule 4.4(A))

OTS 6.2

6.2 SERVICE BY PUBLICATION- – NECESSITY TO IDENTIFY REAL PROPERTY

Problem A:

Where service of process is had by publication in an action relating to title to real property must the publication identify the real property?

Standard A:

Yes.

Comment A:

Rule 4.4 of the Ohio Rules of Civil Procedure, "Process: Service By Publication," does not require that the publication contain a legal description of the real property to be subjected to the action. Metes and bounds descriptions are not required. Other methods of identification may be used. Reference to intersections, roads and streets, official municipal street numbers, postal addresses, county designated house numbers, county auditor's permanent parcel numbers, or other like descriptions, suffice.

(~~Effective~~Amended May 10, 2019; ~~as~~ amended January 18, 1991; originally effective November 13, 1971)

OTS 7.1

7.1 COURT PROCEEDINGS- – VERIFICATION OF PLEADINGS

Problem A:

Does the omission or irregularity of a verification of a pleading render a title unmarketable when title is based upon a subsequent order in the case?

Standard A:

No.

(~~Effective as amended~~Amended May 10, 2019; originally effective May 16, 1957)

OTS 7.2

7.2 COURT PROCEEDINGS- – RELIANCE ON FINAL ORDERS

Problem A:

May a final order be relied upon as affecting title in whatever manner is stated in that order, without reviewing any of the other documents filed in the case?

Standard A:

No.

Comment A:

The documents filed in the case should be reviewed to confirm that the proceedings were in order and that there is a final order. For example, care should be taken to ensure that all parties that had an interest in the real property were named and properly served, if the final order would

have any effect on the interests of those individuals or entities. Consideration should also be given to whether the time to appeal from the final order has expired and whether a stay of execution of the final order has been ~~sough~~sought or other execution has been made.

(Effective May 10, 2019)

OTS 9.1

~~Prepared by the Real Property Law Section of the Ohio State Bar Association~~

9.1 OHIO RULES OF CIVIL PROCEDURE- – RETURN RECEIPT UNDER RULE 4

Problem A:

Is it a requirement that the return receipt be signed by the addressee ~~himself~~?

Standard A:

No.

Comment A:

Certified mail service as provided under the Ohio Rules of Civil Procedure does *not* require "actual service" upon the defendant, but is effective upon a "certified delivery." Due process is effectively met by the standard delineated in *Mullane v. Central Hanover Bank and Trust Co.,* 339 U.S. 306, and *In re Foreclosure of Liens*, 62 Ohio St. 2d 333. The standard provides that for certified mail service to be valid, such service "...must be *reasonably calculated under all the circumstances,* to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objection." (Emphasis added.) *Mitchell v. Mitchell*, 64 Ohio St. 2d 49, 51, 413 N.E.2d 1182 51, 18 003d 254 (1980).

(~~Standard A originally effective April 29, 1971. Amended November 11, 1972, and further amended effective November 7, 1981~~November 7, 1981. Standard A originally effective April 29, 1971)

Problem B:

When the return receipt is signed by someone other than the addressee, is it a requirement that the addressee's name appear on the return receipt as the post office provides?

Standard B:

No.

Comment B:

However, in multiple-defendant cases each return receipt should show data sufficient to enable the ~~examiner~~examining attorney to identify the addressee to whom the receipt pertains. If the name of the addressee does not appear on the receipt or is illegible, the ~~examiner~~examining attorney should attempt to identify the addressee by comparing the certified number, the address where delivered, the postmark or other data shown on the receipt with the clerk's records concerning the mailing and with the other return receipts in the file.

"Certified mail service ... is valid where the envelope containing the documents to be served is delivered to a person other than the defendant at the defendant's address." *Mitchell v. Mitchell*, 64 Ohio St. 2d 49, 51, 413 N.E.2d 1182, 18 003d 254 (1980).

Further, both Rule 4.1 and Rule 4.3 of the Ohio Rules of Civil Procedure provide that once the clerk has properly addressed the envelope to the person to be served at ~~their~~ his/her last known address, affixed postage and sealed the envelope as certified mail, return receipt requested, the clerk must instruct the delivering postal employee to show to whom delivered, date of delivery, and address where delivered.

(Amended November 7, 1981; amended November 11, 1972. Standard B originally effective April 29, ~~1971. Amended November 11, 1972, and further amended effective November 7, 1971~~)

Problem C:

Is it a requirement that signatures on the return receipt be legible?

Standard C:

No.

Comment C:

The illegibility of a signature should be considered objectionable only when the identity of the signatory would be especially significant (as in Title Standard 9.4 for example) and such identity is not otherwise ascertainable from the record.

Problem D:

Is it a requirement that the return receipt bear the certified number?

Standard D:

No.

Comment D:

But see Comment B, above.

Problem E:

Is it a requirement that the return receipt show: (1) to whom delivered, (2) the date of delivery, and (3) the address where delivered, as the post office form provides?

Standard E:

No.

Comment E:

The receipt should ordinarily be considered sufficient if it appears to show that delivery was made by the postal authorities either to the addressee or to another for the addressee, notwithstanding the fact that it is incompletely or improperly filled out. See Comment B, above.

(Amended November 11, 1972. Standards C, D, and E originally effective April 29, ~~1971. Amended effective November 11, 1972~~1971)

Problem F:

Is it a requirement that the return receipt be a part of the file?

Standard F:

Yes.

Comment F:

If the receipt is missing from the file, the ~~examiner~~examining attorney, in an appropriate case, may wish to rely upon the docket entry made by the clerk in accordance with Rule 4.1~~(1)~~ or Rule 4.3 (B)(1) of the Ohio Rules of Civil Procedure with respect to the fact of notification.

Rules 4.1~~(1)~~ and 4.3(B)(1) of the Ohio Rules of Civil Procedure specifically provide that "the clerk shall file the return receipt or returned envelope in this action."

(Amended November 7, 1981; amended November 11, 1972. Standard F originally effective April 29, ~~1971. Amended November 11, 1972 and further amended effective November 7, 1981~~1971)

Problem G:

When the return receipt is not signed by the addressee ~~himself~~, is it necessary that inquiry be made concerning the identity of the recipient, ~~his~~ the relationship to the addressee or ~~his~~ the connection with the place of delivery?

Standard G:

No, unless there are other factors which would be sufficient to create a reasonable doubt in the mind of the ~~examiner~~examining attorney concerning the propriety of the delivery.

Comment G:

The fact that the record fails to reveal any apparent relationship between the recipient and the addressee or the place of delivery is not of itself sufficient ground for questioning the propriety of the delivery. In the absence of other circumstances which would create a reasonable doubt in the mind of the ~~examiner~~examining attorney, it should ordinarily be presumed that delivery was made by the postal authorities to an appropriate person at a proper address. If the circumstances as a whole are sufficient to create such a doubt, satisfactory proof of ultimate delivery to the addressee ~~himself~~ should be required. If furnished, such proof should be made a matter of record. (See Comment A, above.)

(Amended ~~effective~~ November 11, 1972; originally effective April 29, 1971)

OTS 9.2

9.2 PROCESS - NAME UNKNOWN

Problem A:

Does Rule 15(D) of the Ohio Rules of Civil Procedure require personal service in a case covered by ~~R.C. Sec.~~ Ohio Revised Code Section 2703.24?

Standard A:

No.

(Effective April 29, 1971)

OTS 9.4

9.4 OHIO RULES OF CIVIL PROCEDURE- – DOMESTIC RELATIONS PROCEEDINGS

Problem A:

Should an objection be made to a title derived through an uncontested divorce, alimony or annulment action when the certified mail return receipt or the sheriff's return of service in the action shows that summons was served on the defendant by delivering it to the plaintiff?

Standard A:

Yes.

Comment A:

In such an action under the circumstances described, proof that the defendant actually received the summons should be required. If furnished, such proof should be made a matter of record.

(Effective November 13, 1971)

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