inheritance. If the clients have children from previous relationships, then a separate trust for each spouse may be more effective.

If the surviving spouse's interest in the joint trust becomes an irrevocable trust after the death of the first spouse to die, then literally all of the survivor's assets may be held in an irrevocable trust. Some survivors may resist this lack of flexibility.

IX. CONCLUSION.

Freedom from the focus on utilizing two exclusions from the federal estate tax has opened up many options for creating estate plans for married couples. The new challenge is to find the most effective plan for each client.

ENDNOTES:

[1]I.R.C. § 2010(c)(3).

[2]I.R.C. § 2631.

[3]I.R.C. § 2056(b)(7).

[4]Ohio Rev. Code § 5815.36.

[5]I.R.C. § 1014.

[6]*Estate of Clayton v. C.I.R.*, 976 F.2d 1486, 92-2 U.S. Tax Cas. (CCH) P 60121, 70 A.F.T.R.2d 92-6262 (5th Cir. 1992). *See also* Treas. Reg. § 20.2056(b)-7(d) & 7(h).

[7]I.R.C. § 1014.

[8]Consider using broad exculpatory language to protect the person who has been given the authority to grant a general power of appointment.

[9]Ohio Rev. Code § 5808.18.

[10]Ohio Rev. Code § 5801.10 & Chap. 5804.

[11]*C.I.R. v. Bosch's Estate*, 1967-2 C.B. 337, 387 U.S. 456, 87 S. Ct. 1776, 18 L. Ed. 2d 886, 67-2 U.S. Tax Cas. (CCH) P 12472, 19 A.F.T.R.2d 1891 (1967).

[12]1973-1 C.B. 405.

[13]Acker, *Fixing Broken Trusts: The Ohio Trust Code had made this Harder, but it's all Better Now,* 23 PLJO 257 (July/Aug. 2013).

[14]Eilers, *Two Trusts for Better Administration,* 28 PLJO 40 (Sept./Oct. 2017); Swift & Seils, *The "Basis" for Using a Joint Trust in Ohio,* 26 PLJO 91(Jan./Feb. 2016); Whitehair, *Income Tax Planning: Problems with Joint Trusts,* 26 PLJO 20 (Sept./Oct. 2015); Brucken, *Why Joint Trusts?,* 25 PLJO 185 (Mar./Apr.2015).

REVISITING OHIO'S HARMLESS ERROR STATUTE—SAVING GRACE OR UNINTENDED LOOPHOLE?

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In 2006, the Ohio legislature passed RC 2107.24, the "harmless error" statute aimed to provide an equitable mechanism to admit a will to probate that otherwise failed to meet the stringent execution formalities in RC 2107.03. When the Lorain County Probate Court precedentially admitted to probate a deliberately drafted, executed, witnessed and preserved will prepared on an electronic tablet in *In re Estate of Castro*, 2013 WL 12411558 (Ohio C.P. 2013), it relied on RC 2107.24[1] as one of its bases for doing so.

Castro is a perfect example for how RC 2107.24 was *intended to be used*. After all, the statute intended to focus solely on errors in execution, still requiring clear and convincing evidence that (1) the decedent prepared the document purporting to be a will, (2) the decedent intended the document to be a will and (3) the decedent signed that document at the end in front of two witnesses. The testator in *Castro* took methodical steps to draft a will and execute it in compliance with all of the formalities in RC 2107.03, other than by writing it on paper. Reasonable practitioners would conclude RC 2107.24 served its purpose in that instance.

However a recent case out of the Sixth District Court of Appeals, *In re Estate of Shaffer*,[2] raises the specter that the statute can be used as a loophole for a negligent testator or devious beneficiary to circumvent the statutory formalities that every other Ohio citizen is required to follow. This article explores the complicated facts in *Shaffer* and the implication of this decision on electronic wills and the future use of RC 2107.24.

FACTS OF IN RE ESTATE OF SHAFFER.

Joseph Shaffer was a sophisticated businessman, known to keep his affairs private and apparently averse to acknowledging his own mortality. He had

two sons, including Terry Shaffer who was involved in Mr. Shaffer's business venture. Mr. Shaffer also had a long-time companion, Juley Norman. Juley lived in close proximity to Mr. Shaffer and grew closer to him after her husband, who had been treated by Mr. Shaffer, passed away. They spoke multiple times a day, spent considerable time together, traveled and spent holidays together and served as consultants for their respective businesses.

In 2006, 78-year-old Mr. Shaffer found himself amid what he believed was a medical emergency. Before he presented for medical treatment, he wanted to memorialize his last wishes. He summoned Juley, who was with her son, Zachary Norman, to his home. Juley testified Mr. Shaffer asked for some paper. On that paper, Mr. Shaffer wrote the following:

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

He signed the document *Joseph I Shaffer*. Juley testified that he read the document out loud to her and asked her what she thought. He gave the document to Zachary for safekeeping. Mr. Shaffer then submitted himself to the hospital and was released two days later after treatment.

Mr. Schaffer recovered and survived for six years after this hospitalization. Witnesses testified that Mr. Shaffer refused to discuss his estate planning or the document with a legal professional, insisting that it was sufficiently executed, primarily because he had prior estate planning done in Pennsylvania where he claimed witnesses were not required to validate a Will. Mr. Shaffer, on at least two occasions, brought up the document to Zachary, referring to it as his "Will." Mr. Shaffer never consulted with an attorney regarding the "Will" and did not complete any additional estate planning prior to his death, purportedly because it made him uncomfortable to discuss such matters, even though he had access to and regularly consulted with attorneys on other business matters. Nor did Mr. Shaffer discuss this "Will" with his two sons at any time after its 2006 execution. Mr. Shaffer unexpectedly passed away in 2015.

After Mr. Shaffer's death, Terry Shaffer filed Mr. Shaffer's 1967 Will for probate and was appointed as his Executor. Subsequently, Zachary filed an Application to Probate the 2006 document as Mr. Shaffer's Last Will and Testament arguing that even if the document did not comply with the requirements set forth in RC 2107.03, it should be admitted under Ohio's harmless error statute, RC 2107.24. An evidentiary hearing was held.

THE PROBATE COURT DETERMINES THE 2006 "WILL" IS INVALID.

Testimony was presented by Terry and Juley. The probate court determined the 2006 document was not executed pursuant to the requirements in RC 2107.03, which required two witnesses to sign the document contemporaneous with the testator. Under RC 2107.24, the probate court found that Zachary as proponent of the 2006 document failed to carry his burden of clear and convincing evidence under RC 2107.24 because: 1) Mr. Shaffer had not referenced his prior will in the 2006 document or to the witnesses; 2) the language of the 2006 document is contradictory because Mr. Shaffer wrote his estate was "not completely settled" and yet he devised "all" of his property; 3) Mr. Shaffer prepared the document while he was in the midst of a health crisis and may not have been able to form a clear intent; 4) Zachary himself questioned Mr. Shaffer as to the validity of the document and yet no one at the hospital was asked to witness the 2006 document; 5) the 2006 document did not mention Mr. Shaffer's other son or indicate how the remainder of his estate would be distributed.[3] Importantly, the probate court held that RC 2107.24 does not revoke the requirement of RC 2017.03 of attestation and subscription. Rather, the probate court determined the purpose of RC 2107.24 is to provide for admission of nonconforming wills due to inadvertent mistake in execution or unusual circumstances warranting a remedy—not for cases where the testator was ignorant of the law.[4]

THE SIXTH DISTRICT COURT OF APPEALS REVERSES.

The Sixth District Court of Appeals reversed, finding that the 2006 document was intended by

the testator to be his Last Will and Testament, proven by clear and convincing evidence. Its opinion relies heavily on the policy argument that RC 2107.24 is consistent with the modern trend in non-probate transfers, which do not require the stringent formalities of the execution of a will. *See* Milligan, *The Effect of a Harmless Error in Executing a Will: Why Texas Should Adopt Section 2-503 of the Uniform Probate Court* [sic], 36 St. Mary's L. J. 787, 797-803 (2005); Glover, *Minimizing Probate-Error Risk*, 49 U. Mich. J.L. Reform 335, 346 (2016). The Sixth District concluded that RC 2107.24 "shifts the focus from compliance with statutory formality to a factual determination of whether of the testator intended to create a will." *Id*., ¶ 42. The Court went further, concluding that ignorance of the law is tantamount to an inadvertent mistake, stating: "RC 2017.24 simply addresses wills which do not meet the formal standards of RC 2107.03. The General Assembly could have, but did not, limit the reason for the failure to inadvertent mistakes in execution or unusual circumstances rather than mere ignorance of the law." *Id*., ¶ 58.

IS RC 2107.24 A SAVING GRACE OR A LOOPHOLE?

If RC 2107.24 is merely an exercise to determine a testator's intent, what is the purpose of RC 2107.03? Does it matter if a testator even tries to comply with Ohio law in memorializing her final wishes? The probate court's assertion in *Shaffer* that "the purpose of RC 2107.24" is to remedy an "inadvertent mistake in execution or unusual circumstances" rather than "cases where the testator was ignorant of the law" was rejected by the Court of Appeals. However, that assertion is supported by the expressed intent by the committee proposing the legislation that created RC 2107.24. *See* Dykes and Andrewsen, *Harmless Error in Will Execution*, 2003 PLJO 36 (Nov/Dec 2003). Dykes and Andrewsen discuss an example where there was an error in execution only, in that one of the present witnesses to the will mistakenly forgot to sign the document in a flurry of other document execution activity. This practical example as the basis for the need for the harmless error statute demonstrates, at least, an intention to remedy a mistake in execution rather than to provide further leniency to an ignorant or grossly negligent testator. Moreover, RC 2107.24 specifically provides for the recovery of fees from an attorney who participated in a negligent execution. *See* RC 2107.24(B).

Can both propositions co-exist in light of RC 2107.03? It seems that if the Ohio legislature took deliberate measures *not* to relieve a testator from the requirements of RC 2017.03—as long as they were the result of inadvertent mistake—the purpose of the statute was *not* to allow the admission of a document to probate that was the result of the testator's *negligence* and *ignorance*. Yet in *Shaffer,* the Sixth District did just that.—The Court considered extrinsic evidence, but still overlooked the fact that the testator did nothing for over several years after to validate his document appropriately, even after the legitimate suggestion that the document should be submitted to an attorney for legal review. Is that truly the equitable outcome the legislature intended in enacting RC 2107.24?

SHAFFER AS A CASE FOR THE ENACTMENT OF AN OHIO STATUTE GOVERNING ELECTRONIC WILLS.

The proposed enactment of an electronic will statute is founded in the reality that our lives are increasingly paperless and driven by biometrics and electronic communication. While it carries substantial risk in increased litigation and potential for malfeasance, it is likely an inevitability. One use of RC 2107.24 under current Ohio law is for the admission of an electronic will, as in the *Castro* case. Compared to *Shaffer*, though, *Castro* was an easy decision. The evidence in *Castro* unequivocally demonstrated a deliberate, conscientious process by which the testator complied with RC 2107.03, albeit on an electronic format rather than paper. There was no dispute between family and friends as to the credibility of the document or that it was intended to operate as a Last Will and Testament and there was substantial compliance with the formalities. While RC 2107.24 was used to admit the document to probate, it is reasonable to view *Castro* and *Shaffer* as evidence in favor of creating a separate Ohio electronic will statute rather than deciding electronic wills under RC 2107.24.

This is because of the dangers apparent in the

Shaffer decision. Under *Shaffer's* reasoning, what is to stop a nefarious person from using document editing software to affix a decedent's signature to an electronically prepared will and, in cahoots with someone else, seek to admit the same to probate as witnesses to its validity? What *Shaffer* teaches us is that RC 2017.24 is further clarification is needed from the legislature. The statute was *not* expressly intended to function as the gateway for the admission of an electronic will. In this regard, the outcome of *Shaffer* makes the case for the enactment of a separate statute governing the execution and admission of electronic wills to probate, which would serve to provide clarity for practitioners and reduce the likelihood of litigation and consequently inconsistent case law.

An earlier article in this Journal opines that RC 2107.24 is actually more restrictive than RC 2107.03 "since RC 2107.24(A) mandates the will be signed in the conscious presence of the witnesses whereas RC 2107.03 also permits a testator the choice to later acknowledge his signature before witnesses." Gee, *Beyond Castro's Tablet Will: Exploring Electronic Will Cases Around the World and Re-visiting Ohio's Harmless Error Statute,* 2016 PLJO 149, 150 (March/April 2016). This assumes that the testator knew and attempted to execute his or her will pursuant to Ohio law. Thus, an electronic wills statute could focus on substantial compliance with the formalities but for the chosen medium. This would eliminate the seeming stroke of luck in *Shaffer* there were two witnesses present at the time Mr. Shaffer decided to write out his wishes.

THE SUPREME COURT WILL REVIEW IN RE ESTATE OF SHAFFER—BUT NOT DIRECTLY ON THE ISSUE OF THE APPLICATION OF RC 2107.24.

Perhaps the most interesting twist in the case is the Sixth District's holding as to Juley Norman's testimony and her ability to take as a beneficiary under the document she sought to prove. Under RC 2107.03, attestation and subscription by two competent witnesses in the testator's conscious presence are required to make a valid Will. A competent witness is one that is disinterested. RC 2107.15 provides that if a devise or bequest is made to a person who is one of only two witnesses to a will, the devise or bequest is void. The most such an individual can benefit under that circumstance is to the extent they would have benefitted in the prior will or through an intestate share. However, under RC 2107.24, there is no requirement that the witness be "competent" or disinterested. The Sixth District held that the requirement of proof by clear and convincing evidence supplants the requirement that the witness to the non-conforming will be disinterested. Does this open the possibility of admitting a will witnessed by an interested individual under RC 2107.24, rather than RC 2017.03? Isn't this a clear path to circumvent the statutory formalities? It turns out this is a question the Ohio Supreme Court is interested in as well. The Ohio Supreme Court has accepted certification on the following proposition of law: **Ohio's Voiding Statute applies equally to wills executed in compliance with RC 2107.03 and wills submitted pursuant to RC 2107.24. If the will is witnessed by a devisee, either by the devisee's signature or the devisee's testimony, the bequest to the interested witness is void. Stay tuned.**

ENDNOTES:

[1] http://www.chroniclet.com/news/2013/06/25/Judge-rules-that-a-will-written-and-signed-on-tablet-is-legal.html

[2] *In re Estate of Shaffer*, 2019-Ohio-234, 2019 WL 337011 (Ohio Ct. App. 6th Dist. Lucas County 2019), appeal allowed, 156 Ohio St. 3d 1442, 2019-Ohio-2496, 125 N.E.3d 913 (2019).

[3] *In re Estate of Shaffer*, 2019-Ohio-234, ¶ 16, 2019 WL 337011, *3 (Ohio Ct. App. 6th Dist. Lucas County 2019), appeal allowed, 156 Ohio St. 3d 1442, 2019-Ohio-2496, 125 N.E.3d 913 (2019).

[4] *In re Estate of Shaffer*, 2019-Ohio-234, ¶ 17, 2019 WL 337011, *3 (Ohio Ct. App. 6th Dist. Lucas County 2019), appeal allowed, 156 Ohio St. 3d 1442, 2019-Ohio-2496, 125 N.E.3d 913 (2019).

CASE SUMMARIES

North Carolina Department of Revenue v. The Kimberley Rice Kaestner 1992 Family Trust

Headnote: Trust income tax

Citation: *North Carolina Department of Reve-*