

Legislative Updates on House Bill 7 and Other Statutory Law Changes

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I. 2021 Revise Probate Law, Guardianship Law, and Ohio Trust Code (H.B. 7)

A. Overview

After the Ohio House of Representatives passed H.B. 7 by a vote of 98-0 on March 3, 2021, the Senate passed the bill by a 32-0 vote on May 5, 2021. Governor Mike DeWine signed House Bill 7 into law on May 20, 2021, and it became effective on August 17, 2021. The new law made several changes to Ohio probate law, guardianship law, and the Ohio Trust Code that include the following:

- Authorizing guardians, with probate court approval, to create estate plans for wards;
- Allowing a surviving spouse to take an automobile without reduction to the family allowance to which he/she is entitled;
- Providing that creditor rights after a lapse of power of withdrawal are to be terminated; and
- Allowing changes to lists of future successor trustees under trust agreements.

The Ohio State Bar Association Estate Planning, Trust, and Probate Law Section proposed and/or supported these changes. The new law incorporated amendments the Ohio Judicial Conference sought to the law governing private judges and nonprofit corporations as guardians, new rules allowing courts to consider registered nurse mental health diagnoses, and modifications to the probate court name change process along with a name conformity process for adults and minors to correct misspellings and other errors/inconsistencies. The Ohio Supreme Court also obtained an amendment to address the reimbursement of municipal and county court assigned judges.

The OSBA also worked with Lifeline Ohio to remove organ donation from living wills. As such, Ohioans now can register to become organ donors only through the

Ohio Bureau of Motor Vehicles' Donor Registration in order to centralize the information regarding anatomical gifts and reduce confusion and potential conflicting instructions. The updated living will form is available on OhioBar.org.

B. *Guardianship Changes*

R.C. 2111.10 governs corporations as guardians, and the new law provides authority to probate courts to appoint nonprofit corporations domiciled in Ohio and organized under Ohio law to serve as guardians of the person so long as the nonprofit corporation is not the residential caregiver, health care provider, or employer of the incompetent.

R.C. 2111.50 provides that probate courts are the superior guardians of their respective wards, and the amendment allows a guardian to seek probate court approval to utilize estate planning procedures to protect, preserve, and administer the ward's estate for the ward's beneficiaries. The amended statute explicitly states that the statute does not intend to create or imply a duty upon a guardian to apply for authority to exercise any power, and no inference of impropriety or liability of the guardian or other associated with the guardian shall arise as a result of a guardian not applying for authority to exercise a power authorized in the section. The new estate planning procedures available under the statute are disclaimers, trust creation, amendments, and/or revocations, non-probate beneficiary designations, and the power to exercise rights to election options under various assets. Guardians who attempt to exercise these powers should review the statute as to parties entitled to notice of such actions.

C. *Surviving Spouse*

R.C. 2106.13 governs spousal support. While Ohio law has long allowed a surviving spouse to transfer the deceased spouse's motor vehicles into his/her name without probate (up to \$65,000 of vehicles), the prior version deducted the least-expensive car's value from the family allowance even when the surviving spouse elected only one car. The change means a surviving spouse who elects only one vehicle can still receive the full family allowance of \$40,000. Only if the surviving spouse elects two or more vehicles will the value of the lower car be deducted from the allowance.

D. *Anatomical Gift Act*

The bill modifies **RC. 2108.05 through 2108.07, 2108.23, 2108.24, 2108.34, and 2133.07** to eliminate the following as ways to make anatomical gifts: 1) specifying in the donor's will an intent to make such a gift, or 2) specifying an intent to make such gift in the donor's declaration governing the use or continuation, or withholding or withdrawal, of life-sustaining treatment. This eliminates issues such as an anatomical gift taking effect upon the donor's death whether the will is probated or not or is later invalidated.

E. *Name Changes*

Numerous revisions were made to Chapter 2717 of the Ohio Revised Code (Sections include **2717.01 through 2717.11, 2717.13 through 2717.14, 2717.16, and 2717.18 through 2717.19**) to permit a person to file an application in the probate court of the county where the person resides to resolve any discrepancies in the official identity document and to confirm the person’s name on the identity document to the person’s legal name. The bill eliminates hearing and publication requirements to provide probate courts with more discretion on how to administer each action on a case-by-case basis. The residency requirement is reduced from one year to 60 days, and applicants must sign an affidavit stating the application is not made for the purpose of evading any creditors, other obligations, and/or pending bankruptcy proceedings. The provisions also address problems for Ohio citizens seeking federal REAL ID compliant identification documents. The REAL ID deadline was extended to May 3, 2023.

F. *Mental Illness*

R.C. 5122.15 governs hearings as to the hospitalization of the mentally ill, and the modifications permit specially trained and certified mental health nurse practitioners to testify and provide the respondent’s diagnosis and prognosis during civil commitment hearings at both initial and extension hearings. The previous law required that either psychiatrists/psychologists provide such opinions, so the law now provides the probate courts with a third option as to testimony.

G. *Trust Code Changes*

R.C. 5804.11 governs the termination or modification of noncharitable irrevocable trusts, and a slight change was made to clarify that a modification cannot seek to replace the “currently serving” trustee.

R.C. 5805.06 governs the rights of a settlor’s creditors and the power of withdrawal. The modification removes section (B)(2) completely so that, upon the lapse of the power of withdrawal, the trust interest of the former power holder would no longer be available to creditors pursuant to R.C. 5805.06(1).

The bill modifies the Ohio Legacy Trust Act (**R.C. 5816.02, 5816.05, 5816.06, 5816.09, 5816.10, and 5816.14**) to provide the following changes:

R.C. 5816.02: Proposed changes to Division (H) will clarify the current reference of a “transfer” to include “direct or indirect” transfers, making clear that indirect transfers into an Ohio Legacy Trust are also covered by its protections.

Section (S)(1)(b)(i) also clarified the current reference to the “superintendent of banks” to include a more contemporary reference to the “superintendent of financial institutions.”

Section 5816.02(S)(b)(ii) (I-IV) was added to permit an Ohio Family Trust Company to be the qualified trustee of an Ohio Legacy Trust. The Ohio Family Trust Company must maintain an office in Ohio, maintain a bank or brokerage account in Ohio, maintain electronic or physical records in Ohio, and satisfy the other requirements of R.C. 1112.14.

R.C. 5816.02(S)(b)(ii)(V) also creates a requirement to maintain the integrity of an Ohio Legacy Trust when the Family Trust Company is serving as the qualified trustee.

Section (S)(2) was changed to clarify the current reference to “records” to include a more modernized reference to “electronic or physical” records.

R.C. 5816.05: Division (A) was changed to clarify the current reference to a “defined event” to include a more familiar reference to a “stated contingency.” Division (N) now provides that an Ohio Legacy Trust can expressly include a “swap power” under Internal Revenue Code 675.

R.C. 5816.06: A “then” was added to Division (E) to create a clear “if-then” statement regarding the effects of a flawed or omitted affidavit of solvency.

R.C. 5816.09: Various grammatical and definitional clean-ups are made related to “orders” issued by courts (typically from outside of Ohio) that do not apply Ohio law to a legacy trust dispute.

R.C. 5816.10: Divisions (A) and (K) were changed to clarify that these specific statutory provisions governing transfers involving an Ohio Legacy Trust “preempt existing fraudulent transfer laws,” but these also are the “strong public policy of Ohio.”

Division (E)(2) makes grammatical clean-ups to its last sentence.

Division (H) inserts the phrase “any legacy trust matter” twice to more clearly express the intended broad scope of this particular legacy trust statutory provision.

Division (I) now provides that “decanting” can expressly take place from one Ohio Legacy Trust to another Ohio Legacy Trust.

Division (J) now provides more consistent meaning to the words “action” and “proceeding.”

H. Probate Courts

R.C. 2101.15 governs probate judges filing itemized accounts of fees with the county auditor. The amendment allows the annual filing to be completed no later

than January 15th of each year while the previous law required the filing to be completed on January 1st.

R.C. 2701.10 governs the referral of civil actions/proceedings to retired judges, and the law was modified to allow the elected judge to have discretion over whether to order the private judge referral, to require a private judging referral to indicate a procedure for terminating the agreement with the private judge, and clarifying that jurisdiction is automatically returned to the elected judge upon conclusion of the referred action. The elected judge must address the private judging referral within 14 days of filing.

I. Other Changes

R.C. 1721.21 governs the establishment of endowment care trusts, and no person is allowed to operate or continue to operate any Ohio cemetery unless an endowment care trust is established pursuant to this statute. The statutory changes address what distributions can be used to pay for and modifies requirements to establish and maintain an endowment care trust.

II. 2021 Ohio Case Law

***Alibrando v. Miner*, 5th Dist. Licking Case No. 2021 CA 0010, 2021-Ohio-2827:** The decedent made a 2013 will providing that his girlfriend would receive \$100,000 with the rest of his estate passing to his sons. The girlfriend admitted knowing about the will, and she was appointed the decedent's agent two years after the will was executed. The decedent opened a joint account with his agent. The power of attorney allowed the girlfriend as the decedent's agent to sell his real property and to place the proceeds into an account the decedent owned jointly or separately. Shortly before his death, the girlfriend sold the real property and deposited more than \$200,000 in proceeds into her joint account with the decedent that she inherited upon his death. The decedent's sons objected to the final estate accounting for failing to include the sale proceeds along with a complaint for concealment of assets and breach of her fiduciary duty of good faith. The probate court granted summary judgment for the girlfriend because the undisputed facts established that the decedent was competent when he executed the power of attorney. The appellate court, however, reversed, holding that genuine issue of material fact existed as to whether the girlfriend breached her duty of good faith by not preserving his known estate plan when the decedent's expectations on this issue were not clear.

***Allerton v. Burns*, 5th Dist. Licking Case No. 2020CA00042, 2021-Ohio-500:** The appellate court held that summary judgment was proper in a will contest when the only evidence of lack of capacity/susceptibility was an affidavit from one of the plaintiffs. After creating a 2014 will benefiting some of her children/grandchildren and making her daughter the residuary beneficiary, the decedent created a 2019 will giving additional cash gifts to the grandchildren and left the daughter's residue portion unchanged. Another daughter challenged the 2019 will alleging undue influence/lack of capacity based upon the plaintiff's representation that the decedent had a 2013 stroke that affected the part of the decedent's brain responsible for making financial decisions. As there was no other evidence as to how the stroke made the decedent susceptible to undue influence, and the plaintiff admitted that the decedent was strong willed, the probate court granted summary judgment in favor of the defendant. The appellate court upheld the ruling, holding that the

defendant did have the opportunity to exert undue influence when the decedent lived with the defendant for the last six years of her life. But there was no evidence the decedent was susceptible to undue influence or that the 2019 Will was a result of undue influence.

Campbell v. Donald A. Campbell 2001 Trust, 8th Dist. Cuyahoga Case No. 109585, 2021-Ohio-1731: The appellate court held that a trust beneficiary does not have standing to challenge prior trust transactions before the beneficiary had a vested interest when the prior trustee was the sole trust beneficiary and had since died. The appellate court also held that the probate court had jurisdiction to determine the standing issue when money damages were sought. After the mother passed away, the son became the successor trustee of her trust and a vested beneficiary. At this time, the son discovered his mother had used money in her own trust instead of money available from her husband's trust. The son alleged that his mother's conduct had diminished his inheritance and filed suit seeking to recover funds. The son filed three lawsuits regarding the trust administration, and the probate court dismissed all of the claims for lack of standing and failure to state a claim. The son appealed alleging the probate court lacked jurisdiction because he was seeking money damages due to fraud and because he filed in the general division first. He also claimed to have standing to bring the claims as a trust beneficiary. The appellate court held that the probate court had exclusive jurisdiction over the trust dispute and concurrent jurisdiction over the related claims. The allegations of fraud were against the mother for acts taken in her lifetime, and there were no allegations of fraud against the actual defendants in the case. The Court also held there was no jurisdictional priority in the general division because there were not two related cases in two different courts as the general division transferred to the probate division. The appellate court upheld the probate court's ruling that the son lacked standing to challenge the conduct as trustee when he was not even a vested beneficiary at the time the alleged misconduct occurred. Furthermore, the mother had discretion to spend as much of the money as she wanted for her benefit, and she had exclusive authority over the assets to prevent the son from claiming an injury. Finally, the mother's conduct could not have damaged the son as his interest did not vest until death, and the successor trustees and beneficiaries could not have done harm to the son because the conduct preceded their interests in the trusts vesting as well.

Cowan v. Ohio Dept. of Jobs & Family Servs., 1st Dist. Hamilton Case No. C-200025, 2021-Ohio-1798: The appellate court held there was no hardship exemption for the denial of Medicaid benefits when the applicant owned two parcels of real estate that she was unable to sell. The applicant was in a nursing home and authorized her nursing home to apply for Medicaid on her behalf. The application was denied because she owned two parcels of real property that had an auditor valuation of \$6,000, which was in excess of the Medicaid \$2,000 resource limit. The applicant appealed the denial because she attempted to sell the properties and could not find a buyer. The Ohio Department of Job and Family Services opposed the appeal arguing the nursing home's attorney was really the applicant's attorney, and the trial court agreed and ruled that the real-estate value was in excess of the Medicaid asset limit and there was no applicable exemption. The applicant gave away the parcels and obtained Medicaid approval, but she appealed the decision. The appellate court held that the decision to dismiss for lack of standing/not the real party in interest was an error as the nursing home attorney admitted the nursing home hired him, but he did not indicate representation of the applicant. The denial, however, was upheld because the asset-limit rules were clear, and no exceptions applied.

***Decot v. Biggerstaff (In re Biggerstaff)*, 5th Dist. Perry Case No. 20 CA 00012, 2021-Ohio-591:** The appellate court held that failure to perfect service on a parent when the address is known to the applicant precludes an order approving the name change. The father had moved to California after divorcing the mother, and the mother applied to change the minor daughter's name to her name. The mother listed the father's last-known address but never perfected service upon him. Instead, the mother did service by publication. The father then appealed the granting of the application without a hearing. The appellate court reversed the name change because the father's address was known and service was not perfected, holding that service by publication is not proper when the last known address is known unless and until the applicant can prove failure or refusal of service.

***Disciplinary Counsel v. Schwab*, Ohio Supreme Ct. Case No. 2020-0987, 2021-Ohio-283:** The Ohio Supreme Court penalized a woman for the unauthorized practice of law because she held herself out as a lawyer in the preparation of estate planning documents. The woman prepared legal documents for a church that represented she was a lawyer. She also met with a married couple and prepared living wills, healthcare powers of attorney, and last wills and testaments with self-proving affidavits. The documents identified her as the lawyer as well. The Ohio Board of Unauthorized Practice of Law determined these actions constituted the unauthorized practice of law, and the Ohio Supreme Court upheld the decision. A permanent injunction was issued to the woman to cease the unauthorized practice of law, and she was fined \$5,000 for each unauthorized practice of law act.

***Erzurum v. Erzurum*, 7th Dist. Mahoning Case No. 20 MA 0012, 2021-Ohio-1162:** The appellate court reversed a jury verdict because the admitted character evidence against the defendant was prejudicial and outweighed the probative value. The parents transferred rental properties to the son in 2019 and then filed a lawsuit to invalidate the transfers as products of undue influence and/or duress as the parents were in their 90s and had physical ailments. The parents alleged that the son had a deceitful past, including allegations of Medicare fraud, two bankruptcies, and a secretive move to another country without telling his parents. The son claimed he was never charged with a crime, the bankruptcies were necessary as one was at his parents' request, that his parents transferred the real property to him as part of a long-established plan, and that his parents were suing him for refusing to falsify income tax records for the properties. At trial, the jury found for the parents after considering evidence such as the Medicare fraud claim from 2003, the bankruptcy from 2004, the overseas move from 2005 to 2012, and the 2012 bankruptcy. The appellate court determined that the character evidence against the son was more prejudicial than probative, reversed the jury verdict, and remanded the case for a new trial.

***In re: Estate of Abraitis*, 8th Dist. Cuyahoga Case No. 109810, 2021-Ohio-1408:** The appellate court determined that an estate debtor lacks standing to file exceptions to a final account, and that a probate court's order dismissing exceptions was not final and appealable. The probate court ordered a former fiduciary and his attorney to pay attorney fees and costs to the estate they were administering. The former fiduciary died, and the former fiduciary's attorney became the fiduciary of his estate. After the attorney was removed from administering her former client's estate because of the conflict issues, the attorney filed exceptions to the final account, which were dismissed for lack of standing. The attorney, however, filed exceptions to the estate she and her former client had been removed from administering. When her exceptions were dismissed, the attorney appealed

that decision but did not appeal the order approving the final account. The appellate court dismissed for lack of a final appealable order and commented again on the attorney lacking standing. The appellate court held that an order denying exceptions to an account or inventory is not a final appealable order and does not affect a substantial right, so no interlocutory appeal is allowed. Furthermore, even if the order was final, the attorney lacked standing as she was a debtor to the former estate and could not establish a direct pecuniary interest to become a person interested in the former estate.

In re: Estate of Brown, 11th Dist. Trumbull Case No. 2020-T-0049, 2021-Ohio-655: The appellate court held a will's admission to probate is not a final appealable order even when a dispute exists as to whether the will is valid on its face. After the decedent died and one of his children probated his 2003 will, a different child filed a 2019 will with witness signatures that were in print instead of cursive. After a hearing including witness testimony confirming their printed names, the probate court accepted the 2019 will and the 2003 will proponents appealed. The appellate court dismissed the appeal for lack of a final appealable order as the real dispute was the 2019 will's validity, and the order admitting it only determined the 2019 Will's validity on its face. The 2003 will proponents had other remedies—such as opposing the 2019 will's fiduciary appointment and the will contest filing.

In re: Estate of Clonch, 11th Dist. Trumbull Case No. 2020-T-0079, 2021-Ohio-2815: An estate beneficiary objected to the real-estate value listed on the estate's inventory. The beneficiary provided an appraisal of \$109,500 done on a "drive by" basis nearly a year after death, and the appraiser did not access the property's interior. The estate's appraisal also occurred roughly a year after death and was for the amount of \$58,000. The estate appraiser had the ability to inspect the interior and described the property as "rough" with "very unorthodox modifications" as the only heat source was a wood-burning stove. The beneficiary objected to the appraisal because it did not provide a date-of-death value, but the probate court held there had been no significant change/improvement to the property between the death and the appraisal. Furthermore, the estate's appraisal was more detailed and rationally related to realistic date-of-death value. The appellate court affirmed the probate court's determination to overrule the inventory objection, holding that the probate court had discretion to determine the real estate's value for inventory purposes, and the evidence supported the determination.

In re: Estate of Cornell, 6th Dist. Williams Case No. WM-200-005, 2021-Ohio-877: The appellate court held that the probate court abused its discretion in approving a final accounting without a hearing and denying a motion to reopen the estate in which the estate had not properly accepted nor rejected an interested party's claim questioning estate expenses. After resolving a will-contest dispute and appointing another party as executor, the attorney who represented the previously appointed executor requested his attorney fees. The probate court approved the request and accepted a statement in lieu of a final account and discharged the current executor before a letter was sent denying the claim for attorney fees. Both sides moved to reopen the estate to address the issue, but the probate court denied and an appeal was filed. The appellate Court held it was an abuse of discretion not to reopen the estate as R.C. 2109.32 required the probate court to set the final accounting for hearing at least 30 days after filing. The probate court also approved the filings immediately without any opportunity to object.

In re: Estate of Damschroder, 3rd Dist. Seneca Case No. 13-20-19, 2021-Ohio-1558: The appellate court held that a responsive pleading expressing doubts about a will's validity does not trigger a no-contest clause. In response to a will-contest action, one defendant prepared a pro-se letter and mailed it to the court stating the letter was her answer. The defendant stated she did not have the money to hire an attorney, she wanted to protect her estate interests, and she had concerns about the will and other executed documents. The will had a no-contest clause providing that any beneficiary who directly or indirectly opposed the will's probate, or initiated/participated in a direct/indirect challenge to the will, then that person would be disinherited. The pro-se defendant testified at trial but was not asked about the will's validity and did not challenge the same. The jury found the will valid, and the executor filed a declaratory-judgment action asking the court to determine whether the pro-se defendant had violated the no-contest clause. The trial court held the pro-se defendant had not triggered the clause, and the appellate court agreed. The appellate court held that filing a response was not a challenge and was a reasonable and necessary thing to do. The contents of the letter sought to protect the pro-se defendant's interests in the estate and not challenge the will's validity. Furthermore, the pro-se defendant's participation in the will-contest trial was also reasonable and did not relate to the will's validity/invalidity.

In re: Estate of Durkin, 9th Dist. Summit C.A. Case No. 29532, 2021-Ohio-1076: The appellate court held that an order appointing a master commissioner to investigate a fiduciary's conduct during the decedent's lifetime is not a final appealable order. The probate court appointed a special master commissioner to investigate the estate fiduciary's conduct as the decedent's power of attorney prior to death to determine if any additional assets should be included in the estate. An appeal of this order was dismissed for lack of a final appealable order as the master commissioner's appointment does not remove the fiduciary and does not affect a substantial right. While the master commissioner's findings could lead to the fiduciary's removal, such an argument was premature. One judge dissented, claiming a substantial right was affected and interlocutory appeal should be allowed.

In re: Estate of Seiler, 9th Dist. Summit Case No. 29756, 2021-Ohio-115: The decedent died in May 2018 after a hospital treated him for approximately six days. The hospital submitted an invoice for \$341,000 to the decedent's health-insurance carrier, which denied the claim. After the hospital exhausted the administrative review and appeal process roughly a year later, the hospital opened the estate and served itself with a creditor claim. The hospital claimed its claim was contingent pursuant to R.C. 2117.37 because the appeal process did not end until April 2019 to provide the hospital with a claim. As such, the 2019 claim was timely filed. The probate court allowed the claim, but the Ninth District reversed, holding that a claim is contingent only when the liability is not triggered until a later/uncertain event. As the hospital knew it had a claim and the only question was the amount the decedent's insurance would pay, the claim was not contingent and needed to be presented within six months of death.

In re: Estate of Weitzel, 12th Dist. Warren Case No. CA2021-01-001, 2021-Oio-1859: The appellate court held that spousal election rights are tolled until the court issues the formal citation to the spouse. The decedent had two children from a prior marriage before dying intestate. His widow applied to administer his estate and was appointed, but the probate court did not issue the citation to surviving spouse pursuant to R.C. 2106.01. A year after the surviving spouse's appointment, the children filed a motion to bar her from exercising her spousal rights and argued

that she failed to affirmatively elect to exercise those rights within five months of her fiduciary appointment. The surviving spouse argued that her rights never ran because the probate court never issued a citation to her. The probate court agreed and provided her with 14 days to make the election. On appeal, the appellate court agreed that the probate court had a statutory obligation to issue the citation, and that the period did not run until the citation was properly served. While R.C. 2106.01(E) provides that the time for a spouse to elect against a will begins to run as soon as the fiduciary is appointed, the court found it inapplicable because the husband died intestate.

In re: Estate of Wilson, 9th Dist. Summit C.A. No. 29738, 2021-Ohio-1056: The Appellate affirmed a denial of an administrator's application when a conflict existed between the named fiduciary and the next of kin. The probate court denied an application to administer the nominated executor filed after the next of kin filed a will contest action. The appellate court held that the probate court has discretion to appoint an estate fiduciary, and the appellant failed to show an abuse of discretion. The conflict between the applicant and the objector along with the litigation was undisputed, and the appellate court did not find material the challenged will and prior will being pour-over wills to a trust as the sole beneficiary. The appellate court also rejected the argument that the objector did not have standing to object to his fiduciary appointment because he was not a beneficiary under the challenged will or the prior will. The appellate court reasoned that all next of kin are entitled to notice and have standing to object.

Filo v. Filo, 12th Dist. Madison Case Nos. CA2020-01-003, CA2020-03-009, 2021-Ohio-413: After a daughter learned that her father disinherited her with a power-of-appointment execution prior to his death, she filed a declaratory-judgment action against her brother raising claims of undue influence and incapacity. Despite the allegation of a confidential relationship between the brother and his father, the jury held that the father had capacity and the power of appointment was free from undue influence. The daughter argued on appeal that the probate court erred in giving the instruction on testamentary capacity rather than the capacity to contract and excluding the presumption of undue influence. The appellate court determined that the capacity determination would have been the same regardless of the test used, and the probate court properly excluded the relevant law on undue influence based upon the highly credible evidence presented at trial to rebut the presumption.

Froelich v. Rogers, 2d Dist. Montgomery Case No. 28916, 2021-Ohio-604: The appellate court held that a determination of estate heirs is a final appealable order and failure to allow an opposing party to appear and present evidence contrary to the claimed heirs is a violation of due process. A brother and two purported minor children fathered outside of wedlock survived the intestate decedent. A local child-support agency filed a paternity complaint, and DNA evidence showed that the decedent was likely the father of the two minor children. The juvenile court entered an order of paternity but denied child support because of death. A third party applied to administer the estate and petitioned the probate court to determine the heirs. The decedent's brother argued that determinations of paternity after death are invalid for purposes of inheritance, and the administrator provided the probate court with the juvenile court's order. The probate court determined that the minor children had established paternity with no evidence to the contrary and ordered the minor children were the decedent's only heirs. The appellate court reversed, holding that the brother had a potential property interest in the estate and was entitled to notice of a hearing

before being deprived of that right. The appellate court, however, failed to address the parentage determination, remanding the issue to the probate court.

In re: Guardianship of Bakhtiar, 9th Dist. Lorain Case No. 19 CA011508, 2021-Ohio-2162:

The appellate court held that the attorney fees award to counsel for the removed guardian of the person is not subject to appeal after not objecting to the same during the probate proceedings. The ward's son had a contentious and highly litigious relationship with his sister, the guardian of the person. The guardian of the person was removed and a successor was appointed. The law firm representing the removed guardian applied for attorney fees from when the client was the guardian before she was removed. The new guardian of the person and the ward's court-appointed attorney consented to the fees, and the probate court approved the same. The son appealed the judgment entry granting the fees as an abuse of discretion. The appellate court determined the son failed to timely object to the attorney-fee application and did not have standing to appeal the decision.

In re: Guardianship of Bakhtiar, 9th Dist. Lorain Case No. 20CA011676, 2021-Ohio-2163:

The appellate court held that the attorney fees granted against the ward's son who filed frivolous motions in the guardianship proceeding were not improper. The ward's son filed multiple motions and appeals related to the guardian's and the guardian's attorneys alleged acts and omissions. The trial court deemed the motions frivolous, and the probate court awarded attorney fees against the son in favor of the guardianship and some of the attorneys representing the guardians and the ward. The ward's son appealed, arguing the conduct was not frivolous and the joint expert was not properly qualified. The appellate court upheld the determination that the conduct was frivolous, the fees were proper, and that a local attorney whose practice was 85% to 90% in that probate court's jurisdiction properly presented the fees to the court.

In re: Guardianship of Bakhtiar, 9th Dist. Lorain Case No. 201CA011680, 2021-Ohio-2629:

The appellate court held the probate court did not abuse its discretion in denying request to remove guardian, disqualify counsel, and disclose financial records to the ward's next of kin. The ward's son claims the fees the guardian incurred to defend the guardian and the ward in a lawsuit the son and his other siblings filed were excessive. The son also claimed the attorneys and the guardian had conflicts of interest and should be required to produce bank statements to him as the ward's next of kin. Finally, the son sought to remove the guardian and disqualify the attorneys. The probate court denied the motions, holding that the guardian had faithfully carried out his duties, there was no conflict of interest, the fees were reasonable and necessary under the circumstances, and the son did not have standing to claim a conflict with the attorneys. The appellate court affirmed the probate court's decision, holding that the probate court already limited the son's involvement in the guardianship to visitation with his mother without any access to her finances. Furthermore, the motion to compel the attorneys to show cause to justify their attorney fees had no basis in law.

In re: Guardianship of Carney, 8th Dist. Cuyahoga Case No. 110034, 2021-Ohio-1819:

The appellate court held that an attorney who notarized a contested power of attorney was properly disqualified from representing the proposed ward. The principal nominated his son to be his guardian in his power of attorney and also authorized his son to retain attorneys on his behalf. While the father was in a psychiatric unit, though, his cousin had him sign a limited power of attorney nominating the cousin's wife as his guardian. The cousin was an attorney and notarized

the limited power of attorney. The son applied to be guardian, and the cousin's wife filed a competing application. The son argued the limited power of attorney was invalid as a product of lack of capacity, undue influence, and/or improper conduct by the cousin as a lawyer. The probate court granted the son's motion to disqualify the cousin from representing the potential ward because the cousin was a necessary witness to the limited power of attorney's signing. The appellate court upheld the disqualification, holding that the full hearing was not required as the matter could be decided on the briefing. The probate court properly found that the cousin was a necessary witness and that no exception existed to Ohio Rule of Professional Conduct 3.7.

In re: Guardianship of Montgomery, 6th Dist. Erie Case No. E-20-016, 2021-Ohio-1546: The appellate court held that an abuse of discretion occurred when a probate court did not hold a hearing on an attorney-fee application in which the probate court previously authorized the guardian of the person to retain counsel and to bind the guardianship estate to the same. After the guardian dismissed his former counsel, the former counsel filed an application for more than \$15,000 in fees and costs for representing the guardian. The probate court denied the fee application because it had not appointed the attorney, the guardianship had insufficient funds to pay the fee, and the guardian of the estate also objected to the payment. The appellate court determined the probate court had abused its discretion because the guardianship complexities required a hearing on the fee application. Additionally, the probate court did approve an order allowing the guardian to hire the attorney, and the attorney was allowed to present evidence on the necessity/reasonableness of his services.

Hoffman v. Arthur, 5th Dist. Coschocton Case No. 2020CA009 & 2020CA0016, 2021-Ohio-2318: The appellate court held that, even after the ward's death, the probate division retains jurisdiction to interpret a guardianship settlement agreement selecting the probate court as the proper venue. The son filed a lawsuit against his mother and another man alleging that his mother as trustee had improperly transferred trust real estate to the man and an LLC of which the man was the sole member. The son alleged the transfers were invalid pursuant to the trust's terms and were the products of undue influence. The mother was adjudicated incompetent after the lawsuit was filed, and a guardian was appointed. The guardian investigated the claims and joined in the same, but the guardian also filed a counterclaim against the son, alleging the son improperly withdrew more than \$400,000 from his mother's accounts. The parties entered into a settlement agreement to resolve the issues, but the judgement lien against the son was deemed valid and unsatisfied. The settlement agreement provided the probate court retained jurisdiction to enforce and interpret the settlement agreement as the sole and exclusive venue for litigation among the parties. The probate court also issued a judgment entry incorporating the same language on jurisdiction. A dispute arose after death as to whom should administer the estate and whether the son's lien was satisfied. The son argued the lien was paid, but the guardian never executed a release, and the guardian's final accounting did not address the lien. The son filed a motion for summary judgment in the estate seeking a ruling that the judgment lien was satisfied and should be released. The dispositive motion was denied, and the son filed a complaint in the general division against the executor and again moved for summary judgment relying upon the guardian's affidavit that the lien was satisfied. The general division granted the motion, and the parties appealed arguing only the probate division had jurisdiction regarding the settlement agreement. The appellate court agreed, reversing the general division decision as the settlement agreement and the probate division judgment entry made clear the probate division had jurisdiction and jurisdictional priority.

***Lehmann, et. al. v. Westhoeffer, et. al.*, 5th Dist. Tuscarawas Case No. 2020 AP 01 0001, 2021-Ohio-529:** The decedent executed a will that her friend/neighbor of more than 30 years assisted her with preparing. The will had only one witness and left the decedent's entire estate to the neighbor, who was the nominated executor. The will was admitted pursuant to R.C. 2107.24 (harmless error statute), and a pro-se plaintiff filed a will contest that failed to include all of the 31 heirs at law. Two other groups of heirs filed will contests through counsel. The pro-se plaintiff, however, filed an amended complaint without the court's leave and failed to obtain service upon 30 parties who were added as plaintiffs. The probate court dismissed the pro-se complaint for failure to properly add the necessary parties, the pro-se plaintiff did not appeal, and the probate court proceeded on the two other will contests. The will contest was settled after a jury was empaneled, and the pro-se plaintiff participated in the discussions and agreed to the settlement. The pro-se plaintiff, however, filed to stay the settlement even though the probate court approved the final accounting distributing the estate pursuant to the settlement. Even though the pro-se plaintiff cashed his settlement check, he filed a motion for summary judgment alleging fraud, undue influence, lack of capacity, and the application of the voiding statute. The motion was denied, and the decision was affirmed on appeal because the pro-se defendant could not sue on behalf of others as he was not an attorney, his complaint was properly dismissed for failure to include necessary parties, no appeal was filed of the decision, and the pro-se defendant received his settlement funds.

***Love v. Love*, 4th Dist. Jackson Case No. 20CA4, 2021-Ohio-558:** The executor brought money-damage claims in the general division for fraud, unjust enrichment, conversion, and theft against the defendant. The complaint alleged the defendant fraudulently opened a joint bank account with the decedent four days after the decedent was diagnosed with dementia and was unable to identify the year, month, date, town, county, or hospital where he was, and could not write a sentence or draw a clock. The executor also alleged that the decedent's lifetime real-estate transfer to the defendant that happened two weeks after the dementia diagnosis was fraudulent, and the defendant was unjustly enriched. The defendant sought dismissal, alleging among other reasons that the general division lacked jurisdiction. While the general division agreed it did not have subject-matter jurisdiction for the real-estate transfer because the asset would return to the estate, the general division retained jurisdiction over the money-damage claims. The jury granted a verdict against the defendant in excess of \$400,000, and the defendant argued on appeal the jurisdiction issue and the lack of medical evidence on the exact days of the asset changes/transfers. The appellate court upheld the general division's jurisdiction because money damages were sought, and that the medical records and lay testimony about the decedent's health around the dates at issue were sufficient for a jury to determine there was fraud or undue influence.

***Mancz v. McHenry*, 2d Dist. Greene Case No. 2019-CA-74, 2021-Ohio-82:** This case provides that an estate may file a lawsuit to void fraudulent conveyances when the defendant transferred assets to avoid a judgment owed to the estate. In 2009, an estate fiduciary brought a concealment of assets complaint against the decedent's daughter related to misuse of the daughter's authority under the decedent's power of attorney and post-death asset transfers. The estate was awarded a judgment and attempted to collect, and the evidence demonstrated the defendant transferred real estate and other assets to her husband to avoid collection. The estate fiduciary brought a second lawsuit to void the asset transfers to the husband as fraudulent conveyances and received a jury verdict. The defendant appealed, raising 13 separate arguments. The appellate court affirmed the

finding of fraudulent conveyance against the wife, voided the real-estate transfer, and ordered the other assets be paid to the estate.

In the Matter of the Change of Name of OBA, 4th Dist. Scioto Case No. 20CA3920, 2021-Ohio-2212: The appellate court held that the probate court did not abuse its discretion in denying a minor's name change because "custom" was not a sufficient grounds for such a change. The father established paternity with his son and received parenting time. The father filed a petition with the probate court to change the child's surname, arguing that a child customarily receives the father's surname. The mother argued that the name change would confuse the child, and she deserved to give her son his own surname. The probate court determined the name change was not in the child's best interest and denied the petition. The father argued on appeal that the probate court abused its discretion as the court was openly contemptuous of his testimony. Noting that custom was not sufficient evidence of a name change being in the child's best interest, the appellate court agreed that the probate court admonished only the father for the argument that he deserves to give his son his name while the mother testified to the same. But this was insufficient to taint the probate court's ruling and findings under the appropriate factors, and the appellate court affirmed.

McGraw v. Jarvis, 10th Dist. Franklin Case No. 19AP-538, 2021-Ohio-522: An estate planning attorney was found liable for legal malpractice for a failed Medicaid plan because of failure to fund the trust, improper document execution, and poor communication between the drafting attorney and the clients.

McMillan v. McMillan, 8th Dist. Cuyahoga Case No. 109048, 2021-Ohio-698: The appellate court held that a guardian's testimony can be sufficient to grant a divorce between the ward and the ward's spouse when the record shows the ward is not able to testify. The ward married his wife in 2004, but he left the marital home in 2017 and moved in with his daughter. The ward's wife and his daughter filed competing application to be appointed his guardian, and the proposed ward filed a petition for divorce through his own counsel. The probate court appointed the daughter to be guardian because of the conflict of interests between the ward and his wife with the pending divorce. The wife testified at the divorce trial that her husband had attempted to reconcile the marriage, but the daughter testified that the ward filed the divorce, and the return to the home was because he had wandered and gotten lost because of his cognitive issues. The ward did not testify at the trial, and neither party attempted to call him. The domestic relations court held that the ward was incompetent based upon the probate court record, and while there was no evidence of gross neglect or incompatibility, the record was clear that the married couple had lived separately for more than a year. As such, the divorce was granted. When the wife appealed claiming the divorce was improperly granted upon the spouse's testimony, the appellate court affirmed the decision because the ward filed his own petition for divorce, there was no evidence before the domestic-relations court that the ward was competent or able to testify/express his wishes, and there was no error in granting divorce based upon the separate living and the guardian's testimony.

Morris v. Morris, 8th Dist. Cuyahoga Case No. 109854, 2021-Ohio-2677: A mother and sole shareholder of a family business was diagnosed with cancer and updated her estate plan to leave everything to her minor daughter through a trust. The mother nominated her sister and her parents as co-fiduciaries of the estate and trust. The daughter was to have limited access to the trust assets until she turned 25 years old. The daughter never received any notice or information about her

mother's will or trust, never found out about the trust until several years after the mother died, and she never received any assets from her mother's estate/trust. The daughter sued the attorney who helped with the administration of her mother's estate for legal malpractice and her family members for claims including, but not limited to, fraud, breach of fiduciary duty, and accounting. The fiduciaries filed a counterclaim against the daughter for stealing trust records. The jury awarded the daughter \$62,000 in compensatory damages for the fraud and breach of fiduciary duty claims, and \$1 against the daughter for taking the records. As the jury verdict form was unclear whether the jury awarded \$62,000 for each claim or \$62,000 total, the daughter asked the judge to clarify with the jury. The judge refused to ask the jury and set the damages at \$62,000 total. Before the parties could come back the next day for a trial on the punitive damages, the parties reached a settlement in which the daughter was paid \$120,000. After announcing the settlement to the jury the next day, the jury spoke to the counsel and informed them that the jury intended to award \$62,000 for each claim, or a total of \$310,000. The fiduciaries' attorney sought to enforce the \$120,000 settlement, and the daughter argued the settlement was void as a result of a mutual mistake about what the jury intended the damage award to be. The judge denied both requests as the court did not retain jurisdiction to enforce the settlement as the settlement was not put on the record. The judge also ruled against the daughter as she had settled the case and there was no settlement agreement on the record. The appellate court affirmed the trial court because the daughter entered into the settlement agreement before the punitive damages phase. Furthermore, as the settlement agreement was never put into the record, whether the settlement agreement incorporated the jury verdict into the agreement or stood alone was unclear. The appellate court held that settling a case at any point in a trial results in a waiver of any defects up to that point. The appellate court determined that the daughter was not asking the court to interpret the settlement agreement to determine if it was valid and enforceable, and that the daughter had agreed to the visiting judge terminating the trial based upon the settlement agreement and did not otherwise object.

***Nichols v. Bixler*, 5th Dist. Stark Case No. 2020CA00037, 2021-Ohio-129:** The appellate court held that a trust's use of the "agricultural use value" was ambiguous and determined pursuant to extrinsic evidence that the term does not mean property tax valuation of "current agricultural use value." The trust provided that the son could purchase the family farm based upon its "agricultural use value." The son argued that this amount should be the auditor's "current agricultural use value" ("CAUV"), which the Ohio Department of Taxation sets and often is less than fair-market value. As the trust language was deemed ambiguous, the probate court allowed extrinsic evidence and reviewed various farm valuations. The decedent's attorney testified that the grantor reviewed various valuations and intended the value to be what a farmer would pay another farmer to farm the land. The probate court determined that the grantor intended the higher value instead of CAUV, and set the value at \$1.8 million based upon expert testimony. The Fifth District agreed the term was ambiguous and the consideration of extrinsic evidence was proper, affirming the decision.

***In re: Pena*, 6th Dist. Erie Case No. E-19-060, 2021-Ohio-531:** The appellate court dismissed an appeal of a temporary order for lack of jurisdiction when the probate court did not enter a finding of mental illness. The Erie County probate court ordered the appellant to be held because of mental illness based upon affidavits from a doctor pursuant to R.C. 5122.11 and R.C. 5122.111. The appellant was admitted to a Lucas County hospital, and doctors submitted affidavits to the Lucas County Probate Court to have the appellant hospitalized because of mental illness that the

Lucas County Probate Court granted. While Lucas County held a hearing within five days of the order to hospitalize as the law required, Erie County did not. The Lucas County Probate Court ordered that the appellant be hospitalized for 90 days, and the appellant filed objections to the same. A hearing was held, and the Lucas County Probate Court held there was a lack of clear and convincing evidence of mental illness based upon doctor testimony. The appellant, however, appealed only the Erie County Probate Court ruling and not the Lucas County ruling. The appellate court dismissed for lack of jurisdiction as the Erie County Probate Court issued only a temporary order, and the case was dismissed after no hearing was held within the required five days. There was also no determination of mental illness to provide a basis for appeal.

***Progressive Macedonia, L.L.C. v. Shepherd*, 11th Dist. Trumbull Case No. 2020-T-0036, 2021-Ohio-792:** The appellate court affirmed a magistrate’s order after the nursing home unsuccessfully sought the guardian’s removal and was ordered to pay the guardian ad litem’s (“GAL”) attorney fees as the nursing home never objected to the same. The nursing home sought the guardian’s removal for allowing the ward’s Medicaid to lapse. The probate court assigned a GAL to review the matter, and the GAL determined the removal petition was not needed because a retroactive Medicaid application rectified the situation. A dispute arose as to the nursing home’s standing to seek removal, but the ward died before a ruling could be made. The magistrate issued an order that the nursing home must pay the GAL’s fees. But the same day the probate court adopted the magistrate’s order, the nursing home appealed the Court’s order without objecting to the magistrate’s order as to the payment of the GAL’s fees/costs. The appellate court agreed that guardianship proceedings are in rem and typically are limited to the guardian and the ward, and the probate court likely erred in considering the nursing home’s motion to remove. The nursing home, however, invited this error in bringing the claim. The appellate court held that other “interested parties” could seek a guardian’s removal in certain circumstance, but any error was avoidable and not void ab initio.

***Smith v. Smith*, 8th Dist. Cuyahoga Case No. 109899, 2021-Ohio-1955:** The appellate court held that a beneficiary’s incarceration during estate administration does not create an exception to the statute of limitations for a beneficiary to bring breach of fiduciary duty claims 21 years after an estate was closed. One of the decedent’s beneficiaries was incarcerated for all or part of the time that his father’s estate was administered after his father died intestate in 1990. In 2019, the son filed a lawsuit alleging the estate personal representative breached his fiduciary duty by selling real estate and other administration errors. The son claimed his disability as a result of the incarceration and his drug dependency tolled the statute of limitations. The trial court dismissed the complaint on summary judgment after considering arguments under the statute of limitations, doctrine of laches, and the discovery rule. The appellate court upheld the ruling as the incarceration ended in 1998, so the statute of limitations began running at that date. The laches defense was not considered on appeal.

***Stafford Law Co., L.P.A. v. Estate of Coleman*, 8th Dist. Cuyahoga Case No. 109377, 2021-Ohio-1097:** The appellate court held that a creditor claim served upon a fiduciary’s attorney is not properly presented pursuant to R.C. 2117.06, and the probate court did not have jurisdiction to rule a claim was timely presented after the fiduciary rejected the claim. The estate fiduciary rejected a timely claim from an attorney who provided services to the decedent during her lifetime for presenting the claim to the fiduciary’s attorney instead of to the fiduciary personally. After

litigation in both the probate and general divisions, the probate court issued an entry ruling the creditor's claim was timely presented against the estate, but the probate court no longer had jurisdiction to enforce the claim after the fiduciary's rejection. The general division granted summary judgment to the creditor, holding the claim was timely presented. The appellate court reversed, holding that the probate court's entry about proper presentment was void because the probate court lacked jurisdiction after the claim was rejected. The appellate court also reversed because the claim must be presented to the fiduciary instead of the attorney pursuant to R.C. 2117.06.

Yeager v. U.S. Bank, 1st Dist. Hamilton Case No. C-200262, 2021-Ohio-1972: The appellate court held that current trust beneficiaries cannot sue for an accounting of transactions that occurred when they were vested—but not current—beneficiaries. A corporate trustee learned that one of its trust officers embezzled funds from multiple trusts, and the funds were returned before the grantor died. The sons requested an explanation from the corporate trustee as to the reimbursement and a full accounting. No response was received, and the sons filed a lawsuit for an accounting. The corporate trustee sought dismissal for lack of standing as the sons were not beneficiaries during the time at issue and lacked privity. The sons amended their complaint to add claims for breach of fiduciary duty, conversion, and civil theft. The trial court granted the corporate trustee's motion to dismiss. The appellate court reversed because the accounting demand triggered the corporate trustee's duty pursuant to R.C. 5808.13 to respond to the beneficiaries' request for information related to the trust administration unless the request was unreasonable. The appellate court also determined that the sons had privity as this was an irrevocable generation skipping trust that had vested the son's interests upon the trust's creation. While the conversion and civil theft claims were not properly pled, the dismissal was deemed proper to these claims as long as it was done without prejudice. The appellate court held that the sons had properly stated a claim for breach of fiduciary duty.

Zipkin v. Firstmerit Bank, 8th Dist. Cuyahoga Case No. 109501, 2021-Ohio-2583: The appellate court held that a trust settlor's creditor had the legal right to seize funds in the name of the settlor's revocable trust when the settlor defaulted on a guaranty obligation. The settlor created a revocable trust in the 1970s. The settlor also opened numerous personal and trust bank accounts with the bank and obtained a loan for a friend that the settlor individually signed as guarantor. The personal guaranty provided the bank had setoff rights to any account that the settlor held at the bank—individually or jointly. The settlor's friend defaulted, and the bank exercised setoff rights against the settlor's personal bank account and one in the name of his trust. The trial court agreed with the settlor that the trust did not guarantee the loan, and that the law prohibited the setoff from the trust account in breach of the agreement. The appellate court reversed in a 2-1 decision, holding that R.C. 5805.06 permitted the bank to exercise its setoff rights because the statute provides a revocable trust settlor's creditor can reach the settlor's trust interest during his lifetime. With no evidence of a spendthrift trust, the appellate court held the trust account was subject to the setoff as law did not otherwise prohibit the setoff. The dissenting opinion argued that setoff was improper because the trust was not the loan's guarantor, there was insufficient evidence to show that law prohibited the setoff, and because the bank provided no notice or legal process before seizing the trust funds.

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