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Representing a Beneficiary or Heir in the Quest of Information Necessary to Assess Rights in an Estate or Trust: A Survey of Process and Procedure

When unknown inheritance rights are involved, those who have been denied information to which they claim entitlement will turn to counsel to get what they want. Silence breeds suspicion, and against the potential that a disinheritance was caused by a bad acting fiduciary, few would-be inheritors—righteous in their indignation—will simply walk away without a fight. While the potential procedures available to force the production of information depends on the facts and circumstances of each case, good counsel cannot divorce costs from the strategy of pursuit, or in the case of the recalcitrant fiduciary, the cost of blocking access to information. This article explores strategies that I and our estate litigation team have employed to gather information to enable a client to make an informed decision about what next steps might be available to pursue in a quest to restore or protect an inheritance. [1]

A. Identify the problem

The first order of business when receiving a call from a prospective client who claims a right, but has been denied access to information, is assessing the category of case from which the client might demonstrate a right to information. Assume for the purposes of this article, the would-be client is credible and can demonstrate reasonable standing to pursue the information requested. Also assume that we are dealing with access to information about a deceased person's assets and estate planning, as opposed to a living person who is compromised with diminished capacity or being isolated. [2] Some bases upon which standing is claimed, such as a girlfriend of the decedent, are more tenuous and therefore the procedure to employ may be more complicated and bear greater risk of failure than the client who is an heir at law or known beneficiary under previous estate planning instruments. While no list can be exhaustive, the types of problems that often knock on our door can be described as follows:

1. The heir who has standing to challenge a dispositive instrument, but who has been denied information by the person possessing it.
2. A person who has reason to believe she is interested in an existing trust, but that she is unaware of the identity of the trustee, or if the trustee is known, the trustee refuses to share information sufficient to demonstrate the anticipated beneficiary has no rights.
3. A non-heir at law who has reason to believe they were a beneficiary in a preceding will or trust that they think was changed under dubious circumstances.
4. A child who was isolated from his parent under circumstances that demonstrate susceptibility and red flags of undue influence.

In all types of cases, there is a potential path to obtain blocked information. Some paths, by nature, are more cost effective than others. Other paths are more logical to pursue because the path implicates rules of discovery and will initiate a forum from which orders can be issued. Choosing the most effective and efficient path, pre-suit, will depend on the type of case you are

handling. Please do not allow this article to serve as your substitute for research, but these ideas come from a combined 100 plus years of handling these types of problems amongst our firm's team of estate litigation lawyers. [3]

B. The Phone Call versus Introduction via Letter

I first assess whether it is valuable for me to introduce my retention through a phone call. Whether a phone call should be the first approach depends on many factors, including prior known communications and whether you believe the fiduciary has larceny at heart. Where larceny is the risk, a phone call will likely yield no results but, instead, may trigger the potential that a fiduciary might start hiding information or money. In those cases, you might need to consider a complaint with requests for restraining orders (if the basis is reasonable). In most circumstances, however, a phone call is the best and first option to employ as it has the most potential to save time and expense.

You might also opt for the strategy of sending a letter as the introduction, followed by a phone call. We have found that a letter simply stating: "hey, please give me a call about this issue," will not typically yield favorable results. However, a letter that identifies the specific interest at hand, coupled with a short recitation of the duty to provide information and the procedure you will employ to obtain it, tends to produce viable results more often. As an example, our request for information letters might include a statement to the effect: Under, R.C. 5808.10(A) "A trustee shall keep adequate records of the administration of the trust." Under R.C. 5808.13 trust beneficiaries are entitled to demand that the trustee promptly produce sufficient information and records to keep the beneficiary "reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests."

When the reason fiduciaries refuse to produce information is because he/she has hired a tight-lipped lawyer who believes the "attorney-client" or "physician-patient" privileges are unassailable, it helps to point out that Ohio's privilege statute makes exceptions if the claim is based in lack of capacity or undue influence. Therefore, a simple quote of the attorney-client privilege statue will waken those that have no knowledge of the rule. To that end, R.C. 2317.02(A)(1)(b), provides:

> [a] communication between a client who has since died and the deceased client's attorney if the communication is relevant to a dispute between parties who claim through that deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction, and the dispute addresses the competency of the deceased client when the deceased client executed a document that is the basis of the dispute or whether the deceased client was a victim of fraud, undue influence, or duress when the deceased client executed a document that is the basis of the dispute [,]

The reality is many lawyers who do not typically practice in the arena of estate controversies believe that the privilege is absolute, and the decedent takes it to the grave. These attorneys have no idea that the privilege statutes were amended many years ago to eliminate the barrier to this information because they have had no need to look carefully at the rule.

Simply telling the fiduciary (or her attorney) that you have a right to information does nothing to inform the fiduciary as to exactly what you want to see. Our estate team, facts and circumstances pending, often seek: (1) correspondence between the Trustee and a financial institution; (2) correspondence between the Trustee and any person who drafted the trust instrument or amendments; (3) medical records; (4) estate planning documents, including those documents that were voided or reformed/amended; (5) financial records including gifts and beneficiary designations; and (6) powers of attorneys, including a record of transactions performed under the agency. When these efforts fail, or otherwise are not appropriate to pursue as the first step, then you will need to talk to your client about more formal procedures that can be employed to obtain what is needed to assess whether there is value and basis to move forward to a lawsuit. What follows is a basic review of procedures we have employed to successfully shake loose information from a recalcitrant fiduciary and their sometimes-unreasonable attorneys.

C. An Application to Administer Estate

Following the death of the person from who your client claims an inheritance, a probate administration can be initiated. R.C. 2113.06 sets the order of priority for which letters of administration shall be issued in circumstances where the decedent died intestate. Under 2113.06(c), "If there are no persons entitled to administration, if they are for any reason unsuitable for the discharge of the trust, or if without sufficient cause they neglect to apply within a reasonable time for the administration of

the estate, their right to priority shall be lost, and the court shall commit the administration to some suitable person who is a resident of the state … .” This provision gives your client standing to apply to administer in intestate circumstances. I note here that when a recalcitrant fiduciary refuses to provide information, it does not necessarily mean there is no will to probate or no person nominated as executor. But when you have made reasonable requests for information that have been denied, there is no rule that prevents the filing of an application to investigate the existence of a will or assets that are, or could be, made part of a probate estate. Either the recalcitrant fiduciary, upon notice, will produce the will, or be stuck with the fact that your client may be appointed administrator. The value of this option is that, upon appointment, your client will gain the letters of authority which carries with it substantial rights to information, such as: the file of the lawyer who did the decedent’s estate planning, financial records from the decedent’s bank, medical records, and much more.

When your client files her own application to administer, the person with priority to serve, such as the nominated executor that has refused to produce the will, is put in a precarious position: file the will and explain the delay, or stand back and watch their adversary take on the role of fiduciary. Whatever course the recalcitrant fiduciary takes, there is now a forum from which formal discovery can be initiated, such as to fight over suitability; make exceptions to the inventory or flesh out conflicts and conduct that would warrant removal. Now, all of a sudden, information is closer to your client’s finger tips.

D. Complaint to Produce a Concealed Will

In cases where information is being blocked, it is usually because the assets were disposed of through the creation of will substitutes, such as trusts or beneficiary designations. I make this bold statement because otherwise an estate would be opened as a necessary component to claiming the assets. When information, such as the will, is being concealed, it is likely because there are non-probate assets that have been received by others. In such circumstances, such as a belief that the decedent had executed a pour over will into a trust, one procedure to employ to force the production of the will (or sworn testimony that no will exists) is to file a complaint to produce a will under R.C. 2107.09, which may be coupled with an application to administer the estate.

If a will is produced, certain useful information becomes known. For example: (1) the date of execution, which might coincide with a time period of diminished capacity; (2) the identity of the witnesses to the will, who can be reachable by simple phone calls or formal discovery; (3) the author of the will, such as an attorney or a form book; and (4) the identity of the beneficiaries of the will, including who was excluded therefrom. This information alone can be a giant leap for your client to help him/her decide whether further pursuit is warranted. For instance, if your client was disinherited at a time when the decedent was fully competent, your client might decide that further pursuit is not financially or factually viable.

E. Discovery authorized under the Ohio Power of Attorney Act

We are often approached by clients who fought with the agent under a power of attorney to gain information about the transactions in which the agent was engaged. Whether the financial questions relate to gifting, sales for less than fair value, trust funding, or other actions that served to cause a disinheritance upon the death of the principal, a petition can be filed to review the agent’s conduct under R.C. 1337.36. Standing to bring such a claim includes, but is not limited to the principal’s presumptive heirs, a person named as a beneficiary to receive any property, benefit, or contractual right on the principal’s death or as a beneficiary of a trust created by or for the principal that has a financial interest in the principal’s estate, and the executor or administrator of the decedent’s estate can file the petition. An agent, if such a claim is brought, will need to account for their conduct and, because of the broad discovery powers available when a civil action is commenced, as part of the claim, third party subpoenas including to financial institutions can be obtained.

F. Petitions for discovery

There are two separate and distinct causes of action for pre-suit discovery. Ohio Revised Code Section 2317.48 and Civil Rule 34 (D) both require a litigant to show that a viable cause of action exists, and that the discovery sought is necessary to file a complaint. R.C. 2317.48 governs pre-suit interrogatories and provides the following:

> When a person claiming to have a cause of action or a defense to an action commenced against him, without the discovery of a fact from the adverse party, is unable to file his complaint or answer, he may bring an action for discovery, setting forth in his complaint in the action for discovery the necessity and the grounds for the action, with any interrogatories relating to the subject matter of the discovery that are necessary to procure the discovery sought. Unless a motion to dismiss the action is filed under Civil Rule 12, the complaint shall be fully and directly answered under oath

> by the defendant. Upon the final disposition of the action, the costs of the action shall be taxed in the manner the court deems equitable.

The statute is the current codification of what courts previously referred to as an "equitable bill of discovery"—a pre-suit method of discovery that allowed parties to make inquiries when there was limited opportunity to obtain information from an adverse party prior to trial.[4] R.C. 2317.48 permits a potential litigant to seek answers to pre-suit interrogatories to obtain information necessary to draft a complaint. When seeking pre-suit discovery under R.C. 2317.48, a plaintiff must plead enough facts to show that a cause of action exists.[5] In other words, R.C. 2317.48 "provide[s] a 'satisfactory middle course' for litigants who require additional facts in order to sufficiently file a valid complaint, but who already have enough factual basis for their assertions that the discovery process would not be turned into a 'fishing expedition.'"[6]

The other mechanism available to obtain limited pre-suit discovery is Civ.R. 34(D). This rule was enacted to allow "a party who may have a cause of action to ascertain the identity of potential defendants in a variety of civil cases, such as products liability, malpractice, negligence, and wrongful death actions."[7] A deficiency with Civ.R. 34(D), for estate litigation purposes, is that it does not allow pre-suit requests for production of documents to gather proof of a claim; only the identity of a potential adverse party.[8] Additionally, we have defended pre-suit discovery actions, which are usually brought in the general division on the grounds that, if there is (or should be) an estate administration, the Probate Court has exclusive jurisdiction under R.C. 2101.24 and should control the conduct of fiduciaries as well as the discovery of information. For these reasons, the use of pre-suit discovery under R.C. 2317.48 and Civ.R. 34(D) are, in our experience, not cost-effective procedures to uncover the information needed to assess the viability of your client's claims.

G. Investigation of Trust under R.C. 2109.49

Every now and again, I find great value in reading through the index of Ohio's probate code book. There are many gems hidden within the pages of the probate code. For instance, a little employed vehicle found in R.C. 2109.49 authorizes the probate judge, upon written application of ***any party interested in a trust estate***, to appoint a suitable person to investigate the administration of the trust or estate and report to the court. There is sparse case law under this section, but it clearly gives an interested person an avenue to discover information and gives the probate court, in its discretion, the power to appoint an investigator to dig into the questionable transactions at issue.

Conclusion

Statistics suggest that **68 trillion dollars** will be transferring down to the next generation in the next 20 years. The scope of the wealth, coupled with an aging population, compel a prediction that there will be many "disinherited" heirs that will have reason to question the circumstances of their disinheritance or the use of finances by a trusted fiduciary. Many lawyers take the tact that refusal to provide information should be the order of the day, and thus, at great expense, force the person who is simply looking for answers to employ procedures necessary to find what they are looking for.

It is human nature to ask questions. It is also human nature for people to act when they feel they are being denied something to which they feel entitled. As this article has shown, there are many methods for a party interested in an inheritance to uncover information about the facts and circumstances of that inheritance. In a court system with liberal discovery rules, there are few instances where a court will shut down a request for information—though that happens from time to time. There are, however, many more cases where the courts will provide a forum to allow full discovery. When the circumstances easily demonstrate that the person requesting information has no claim, it is much cheaper to provide information that demonstrates there is no claim than to litigate the issue and end up producing the information in any event—at greater cost. I am certain some will disagree with the concept of transparency. Surely you will encounter clients that demand you put up roadblocks. I am only stating the obvious: many of the roadblocks employed are merely phantoms of protection that can be overcome and can lead to the probate court, in equity, assessing costs against your client.

Footnotes

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1 I want to thank my partners, Leon Weiss and Tim Gallagher for freely sharing their ideas as to practice and procedure in an effort to improve the content of this article.

2 Isolation, exploitation, neglect or self-neglect of a living elderly person, and the procedures to gather information in an effort to protect that person from abuse could be the topic of another article, but is beyond the scope of this article.

3 Having a team, or mentor to roundtable legal/strategic solutions for clients who are blocked access to information can be as valuable or more than research in a book. This article is not intended as a scholarly attempt to define or question the scope of procedures available to employ, rather mimics what can be a typical roundtable amongst our team.

4 Poulos v. Parker Sweeper Co., 44 Ohio St. 3d 124, 126, fn. 2, 541 N.E.2d 1031, 1033 (1989).

5 Bridgestone/Firestone, Inc. v. Hankook Tire Mfg. Co., Inc., 116 Ohio App. 3d 228, 232, 687 N.E.2d 502, 504 (9th Dist. Summit County 1996).

6 Fasteners for Retail, Inc. v. Peck, 1997 WL 156707 (Ohio Ct. App. 8th Dist. Cuyahoga County 1997) citing Poulos v. Parker Sweeper Co., 44 Ohio St. 3d 124, 126-27, 541 N.E.2d 1031, 1034 (1989).

7 See Civ.R. 34(D), 1993 Staff Note.

8 See Lieberman v. Screen Mach. Advertising Specialties & Screen Print Design, 1997 WL 52923 (Ohio Ct. App. 10th Dist. Franklin County 1997) (reversing trial court's grant of action for discovery under Civ. R. 34(D)); see also Cruz v. Kettering Health Network, 2012-Ohio-24, ¶ 31, 2012 WL 29351, *5 (Ohio Ct. App. 2d Dist. Montgomery County 2012) (holding that pre-suit discovery under Civ.R. 34(D) is not available to a petitioner for any purpose beyond ascertaining the identity of a potential adverse party).

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