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EDITOR'S MESSAGE

Eight of the twelve subjects in the OSBA legislative wish list have now been introduced into the General Assembly, as SB 232 and HB 432. SB 232 would cancel a TOD affidavit to spouse upon divorce, and would parallel existing statutes doing the same for other spousal beneficiary designations. Introduced last October, it passed the Senate on April 12 and is now before a House committee.. HB 432 is an omnibus bill containing seven more subjects, as noted in the Legislative Scorecard of this issue of PLJO. It was introduced late in January and was reported out by the House Judiciary Committee on April 13 and is ready for the House floor.. It is expected that there is no opposition to any of the subjects in the bills, but their enactment probably will not be completed until the lame duck session after the fall general election, making them effective next year.

HAS IT BECOME TOO EASY TO REMOVE A TRUSTEE OF AN IRREVOCABLE TRUST UNDER R.C. § 5807.06(B)(3): THOUGHTS ON *ULINSKI V. BYERS*, 2015-OHIO-282

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Ohio statutes, affording the ability of a court to remove a trustee, have attempted to draw a reasonable balance between the settlor's choice of trustee to operate a trust within the confines of the trustee's authority, and a beneficiary's ability to protect him or herself from malfeasance. When the Eighth District of Appeals ruled on the case *Tomazic v. Rapaport*, 2012-Ohio-4402, upholding a probate judge's order removing a trustee for serious breach of trust,

IN THIS ISSUE:

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the egregious facts engaged in by the trustee lead reasonable practitioners to conclude that the system works. Since that time, the Ninth District Court of Appeals handed down the decision in *Ulinski v. Byers*, 2015-Ohio-282, which may cause concern that the pendulum of removal has gone so far as to supplant a trustee's exercise of reasonable discretion under the terms of the trust with the court's subjective belief as to how a trust should be administered.

Mr. Ulinski was removed from the position of trustee pursuant to an analysis under Ohio R.C. § 5806.07(B)(3) which provides that a trustee can be removed "[b]ecause of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries." When that section is read in conjunction with the appellate standard upon which a court's decision of removal will be reviewed, it is not difficult to see how the court's power to remove a trustee is exceedingly broad and can result in a removal for reasons beyond what historically required a showing of clear and convincing evidence. See *Trustee Removal: From Common Law to the Controversial,* (Jan/Feb 2006), 16 Ohio Prob. L.J. 67A. According to the Ninth District's decision of *In re Trust estate of CNZ Trust*, 2007-Ohio-2265 at para. 16, "[t]he decision whether to remove a trustee lies within the sound discretion of a probate court, and an appellate court will not reverse that decision absent a showing of clear abuse of that discretion." The evidentiary standard required for a finding under R.C. § 5807.06(B), remains a standard of clear and convincing evidence: "The removal of a trustee is generally considered a drastic action and the party seeking to remove a trustee must show a basis for removal by clear and convincing evidence." *Tomazic v. Rapoport,* 2012-Ohio-4402, para. 33*,* citing *Diemert v. Diemert,* 2003-Ohio-6496, ¶ 15-16. Any indication that this standard was applied to the court's analysis of the trustee's actions or inactions warranting removal is absent from the *Ulinski* opinion.

Mr. Ulinski, like many trustees, was administering a trust agreement that unfortunately was written less clearly than one would like as to who fell into the class of beneficiaries entitled to inherit. Unlike many trustees, however, Mr. Ulinski had drafted the trust at issue and represented the settlors as their trustee for almost two decades prior to the issues giving rise to the underlying litigation. The probate court, in its order of removal, found it compelling that Mr. Ulinski was unable to interpret the trust, and implicitly, the settlors' intent, in the document he had drafted for the settlors almost twenty years earlier. The appellate decision describes the trust as specifically naming five grandchildren to inherit and specifically disinheriting two grandchildren. Despite the language specifically naming the five grandchildren as being entitled to inherit, other provisions gleaned from the appellate briefs, but not well described in the opinion, apparently raised questions as to whether the primary beneficiaries were the only persons

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entitled to inherit versus whether all of the grandchildren of the settlors, exclusive of the two specifically disinherited beneficiaries, were entitled to inherit. It was the trustee's opinion that a legitimate question existed as to whether all of the grandchildren should inherit. Based upon that opinion, Mr. Ulinski used the trust assets to retain an heir finder, located 26 grandchildren, and wrote to all the potential beneficiaries, telling them that they were all beneficiaries of the trust. In response, several of the specifically named grandchildren filed a declaratory judgment action seeking an order that only those persons identified specifically in the trust should inherit the trust assets.

A trustee owes a duty of loyalty to all of the beneficiaries of the trust. This loyalty would extend to any person not specifically identified as a beneficiary, but who based upon a reasonable interpretation of the terms of the trust, have an interest in the assets of the trust. When a trustee is confronted with circumstances resulting in a legitimate question about who the intended beneficiaries of the trust exactly are, the trustee has the power under Ohio R.C. § 5808.16(X) to "prosecute or defend an action, claim, or judicial proceeding in any jurisdiction to protect trust property and the trustee in the performance of the trustee's duties" and has a duty to bring in those persons who may have an interest in the trust so that said persons can set up their interests and defend the action. This is designed to protect the trustee from liability as well as to protect the beneficiaries from the incorrect distribution of trust assets. Therefore, it is a regular and competent process of counseling trustees to ensure that all persons who may have an interest in the matter are included and, under certain circumstances, to request the appointment of a trustee for suit.

In *Ulinski*, when some of the specifically named beneficiaries filed suit, they named the other specifically named beneficiaries and the trustee as defendants to the case, but failed to include those persons whom Mr. Ulinski located through an heir finder as parties to the action. Mr. Ulinski, consistent with practice, filed a cross-claim third party complaint so that the interests of the remaining grandchildren not specifically named in the trust could be set up. At some point after the third party complaint was initiated by the trustee, several, but not all of the parties, filed a motion to remove the trustee claiming that "since redeeming the [settlors'] $250,000 insurance policy, Mr. Ulinski had disbursed to himself and others at least $25,000 to collect trustee fees for services never rendered, to pay for his belated search for the [settlors'] heirs, and to pay lawyers hired to defend his incompetence, neglect, and inaction." *Ulinski,* para. 6. Aside from the fact that Mr. Ulinski was unable to interpret his own trust instrument without the benefit of a judicial decision as to the identity of the beneficiaries, it is hard to discern any facts from the *Ulinski* decision that could be construed as conduct that implicitly rises to the level of breach of trust. Rather, Mr. Ulinski's removal appears to have ultimately been based on his inability to interpret a trust that he wrote and the expenditure of attorney and heir finders fees related to subject matter that is typically considered to fall within the trustee's discretion to spend.

While the trustee powers were not specifically identified in the opinion, Ohio Trust Code and common law clearly authorize a trustee to bring an action for trust construction, to pay trustee fees, and to retain counsel for advice. Further, there is nothing in the Trust Code that requires a trustee to enter into a settlement agreement thrust upon him by persons interested or potential interested in the trust.[1] Under such circumstances, the Summit County Probate Court issued an order of removal. Noted in upholding the order of removal against an objection that the order was procedurally defective due to failure of service upon the trustee of a renewed motion to remove, the court of appeals made clear that the probate court has a duty to remove an errant trustee: ". . .the probate court possesses an inherent power and affirmative duty to remove a fiduciary, even in the absence of any motion, where evidence of the fiduciary's actions which are contrary to the interest of the trust are demonstrated by any means." *Ulinski,* at para. 16 quoting *In re Estate of Howard*, 2006-Ohio-2176 at para. 16. The Ninth District Court of Appeals then went on to conclude that there is no procedural requirement for a hearing on a removal motion. Rather, the court can simply resolve the issue as to whether a trustee should be removed on its own

initiative, and in this case, upon motions, briefs, and sworn testimony. All that is required is that the trustee be given a chance to defend himself in a brief in opposition or affidavit to a request for removal is sufficient. *Id.* at para. 17 and 18 quoting *Wilson v. Allside Inc.* 9th Dist. Summit No. 11667, 1985 WL 10679, 1 (April 10, 1985).

The Ninth District's opinion is heavy on procedural history, but light on the underlying facts that the trustee and beneficiaries relied on to pursue their cases, resulting in the reader being left with many questions as to the legitimacy of the pursuit of an heir finder and extended litigation over who were beneficiaries of the trust, questions that would have been central to the probate court's decision to remove on the basis that the trust was not being "administered effectively." Review of the underlying appellate briefs and probate court order provide some clarity as to what facts were before the court. It appears from a reading of the trust language provided in the parties' briefs that the question of who were beneficiaries turns on the question of whether the settlors intended on including grandchildren born to them after the drafting of the document as beneficiaries of their trust assets. While there are specifically named and specifically excluded grandchildren, there is also language indicating that the class of grandchildren includes "subsequently born" grandchildren. *Brief of Appellant*, pgs. 7-8, quoting the Trust Instrument. It is true that the trustee was also the draftsman of the document, however, in light of the failure of the settlors to update their document as subsequent grandchildren were born, the trustee appears to have been left with a legitimate interpretation question. It is difficult to see how the probate court could fault the trustee for pursuing an answer to this interpretation question or participating in litigation initiated by some beneficiaries to clarify and confirm that his administration of the trust was proper. However, the reason why the law provides the court with wide discretion is because the trier of fact is undoubtedly in the best position to review and determine the credibility of the witnesses and the case as a whole. Indeed, in *Ulinski*, there very well may have been circumstances and credibility issues plaguing the trustee that were not captured in the appellate record.

In *Ulinski,* the probate court exercised its discretion focusing on the unappealing accounting of substantial fees expended on an heir finding service, attorney and trustee fees prior to litigation being initiated. However, under a different view, the expenditure of these fees could be interpreted as a trustee attempting to avoid litigation. Ultimately, the probate court's order of removal referencing the Charles Dickens novel *Bleak House* leads the reader to believe that the probate court held the opinion that the trustee's administration was ineffective in that he was simply using the trust and a manufactured conflict in the language he drafted to generate fees for himself and his attorneys through unnecessarily extended court proceedings. The potential hazard in this opinion, and perhaps the very broad discretion afforded the probate court in R.C. § 5807.06(B), is that a trustee can be removed for taking action allowed by the Ohio Trust Code and warranted by the terms of the trust simply because the court does not agree with the trustees' chosen course of action.

Beneficiaries of trusts are too frequently abused by errant trustees and the removal provisions found in the Ohio Trust Code give them power to protect their interests. Trustees do not have to engage in serious breach of trust to cause beneficiaries distress and/or take advantage of their power to the detriment of the interests of the trust and its beneficiaries. Yet there are certain powers that a trustee is granted and certain expectations of a settlor in creating a trust and appointing the trustee that if reasonably acted upon by the trustee that should be protected. Taking such permitted action, without more, should not rise to the level of an order of removal. Otherwise, the power to remove, while subject to an abuse of discretion standard, becomes circular and in practice becomes the power to remove for no reason at all.

ENDNOTES:

[1]The Ulinski v. Byers decision appears to suggest that the refusal to enter into the settlement agreement was unreasonable, but if that is the standard, then any trustee who is involved in litigation should be nervous.

DIFFICULTIES IN PRESENTING A CREDITOR'S CLAIM: *WILSON V. LAWRENCE*

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Ohio Revised Code ("ORC") section 2117.06(B) provides a seemingly simple rule regarding the presentment of creditor claims against a decedent's estate:

> (B) Except as provided in section 2117.061 of the Revised Code [(regarding the Medicaid estate recovery program)], all claims shall be presented within six months after the death of the decedent, whether or not the estate is released from administration or an executor or administrator is appointed during that six-month period. Every claim shall set forth the claimant's address.

Further ORC section 2117.06(C) generally provides that "a claim that is not presented within six months after the death of the decedent shall be forever barred as to all parties, including but not limited to, devisees, legatees, and distributees." That six-month claims period has been in effect since April 8, 2004 (as of which 2003 H. 51 reduced the creditor's claim period from one year to six months after the decedent's death).

For an unsecured creditor to "preserve" a claim against a decedent's estate for the unpaid balance of any debt incurred by the decedent during the decedent's life, it is essential that the creditor's claim be "presented" within the six-month period after the decedent's death.

The statutory methods for "presenting" a creditor's claim are set forth at ORC section 2117.06(A), as follows:

> (A) All creditors having claims against an estate. . .shall present their claims in one of the following manners:
>
> (1) After the appointment of an executor or administrator and prior to the filing of a final account or a certificate of termination, in one of the following manners:
>
> (a) To the executor or administrator in a writing;
>
> (b) To the executor or administrator in a writing, and to the probate court by filing a copy of the writing with it;
>
> (c) In a writing that is sent by ordinary mail addressed to the decedent and that is actually received by the executor or administrator within the appropriate time specified in division (B) of this section. For purposes of this division, if the executor or administrator is not a natural person, the writing shall be considered as being actually received by the executor or administrator only if the person charged with the primary responsibility of administering the estate of the decedent actually receives the writing within the appropriate time specified in division (B) of this section.
>
> (2) If the final account or certificate of termination has been filed, in a writing to the distributees of the decedent's estate who may share liability for the payment of the claim.

In the recent case of *Wilson v. Lawrence*, 2015 WL 7078582, 2015-Ohio-4677 (Nov. 12, 2015; 8th Dist., Cuyahoga County), the court of appeals addressed a fact situation where the creditor, James A. Wilson ("Wilson"; to whom $187,000, plus interest, allegedly remained due from "Decedent," Joseph T. Gorman, as of his death) attempted to "present" written notice of his claim to (i) Decedent's accountant (who also was the successor trustee of Decedent's revocable trust) and (ii) to Decedent's executive assistant, neither of whom was the executor or administrator of decedent's estate.

The recipients of Wilson's "misdirected" presentment letter both testified that they forwarded Wilson's letter to the attorney for the estate, and Decedent's accountant/trustee further testified that he forwarded a copy of Wilson's letter to the executor of Decedent's estate. The accountant testified in his deposition that he forwarded Wilson's letter "probably within a week" of having received it, and the executive assistant testified that she had forwarded Wilson's letter to the attorney for Decedent's estate "on the day" she received it.

The timeline for the alleged "presentment" broke down as follows:

(i) Decedent died on January 20, 2013;

(ii) William Lawrence ("Lawrence") was appointed as executor of Decedent's estate on July 1, 2013;

(iii) The letter attempting to "present" Wilson's claim was mailed to the Decedent's accountant/trustee and Decedent's executive assistant on July 11, 2013;

(iv) Decedent's accountant/trustee testified to having received the creditor's letter on July12, 2013 (the appeals court opinion does not specify a date as of which Decedent's executive assistant received her copy of the letter);

> (v) Both the accountant/trustee and the executive assistant testified that they promptly forwarded Wilson's letter to the attorney for Decedent's estate, and the accountant/trustee testified that he also forwarded a copy of Wilson's letter to Lawrence, but no evidence in the record indicated on what date Lawrence or his attorney actually received a forwarded copy of Wilson's letter; and
>
> (vi) By letter dated July 24, 2013, counsel for Decedent's estate informed counsel for Wilson that his claim was rejected, asserting that mailing the claim "to the trustee of the [D]ecedent's trust and to his executive assistant are insufficient to effectuate the filing of an appropriate claim."

On those facts, the trial court held that Wilson had not "presented" his claim to Lawrence within the six-month claims period, since Wilson had not sent his claim letter directly to Lawrence or his counsel. Accordingly, in granting Lawrence's motion for summary judgment, the trial court found that Wilson's claim was time-barred for failure to timely "present" his claim to the executor.

A majority of the Cuyahoga County Court of Appeals (Eighth Appellate District) reversed the trial court's decision, holding that (i) prior Ohio case law has found that timely "presentation" of a written creditor's claim to the attorney for the executor is sufficient to satisfy the "presentation to the executor" requirement of Revised Code section 2117.06(A)(1)(a); and (ii) the "forwarding" of the creditor's claim letter to the attorney and/or the executor would be deemed a timely "presentment" if the attorney for the estate or the executor had, in fact, received a copy of such claim letter on or before July 20, 2013 (the statutory 6-month deadline). The case was remanded to the trial court for a determination of whether, in fact, the attorney or executor of Decedent's estate actually received Wilson's claim (as forwarded by either Decedent's accountant/trustee or Decedent's executive assistant) prior to the expiration of the 6-month filing deadline on July 20, 2013.

In a spirited dissent, Judge Mary J. Boyle defended the trial court's decision, indicating her view that Ohio law requires presentment of a creditor's claim either directly "to" the executor or administrator, or directly "to" an executor's attorney. The dissent relied primarily on *Jackson v. Stevens*, 1980 WL 350961, 1980 Ohio App. LEXIS 12905 (4th District, Scioto County Jan. 24, 1980), which held that presentment of a claim to a third party (i.e., a person other than the executor, administrator or attorney for the estate) who forwards such written claim to the executor within the six-month deadline is not sufficient to "present" the claim within the meaning of Revised Code section 2117.06(A)(1)(a).

The dissent points out that the majority's holding would substitute a "knowledge of the executor" rule in place of the statutory requirement of the "presentment" of written notice of the claim "to" the executor.

Wilson v. Lawrence highlights the importance of following "the letter" of Ohio Revised Code section 2117.06(A)(1)(a) when formally "presenting" a creditor's claim "to" an executor or administrator. It is clear that a written claim sent directly to the executor or administrator satisfies the "presentment" condition so long as such claim is delivered within six months after decedent's death. Similarly, it seems well-established that a written claim sent directly to the attorney for the estate will serve as a valid presentment "to" the executor or administrator. *See Peoples Nat'l Bank v. Tryon*, 16 Ohio App. 3d 410, 476 N.E.2d 372 (2nd Dist. Miami County 1984); *Cannell v. Bulicek*, 8 Ohio App. 3d 331, 457 N.E.2d 891 (8th Dist. Cuyahoga County 1983); *In re Estate of McCracken*, 9 Ohio Misc. 195, 224 N.E.2d 181 (Portage County Prob. Ct. 1967); *In re Estate of Clark*, 11 Ohio Misc. 103, 229 N.E.2d 122 (Clermont County Com. Pl. 1967).

Wilson v. Lawrence provides a cautionary tale about mailing or delivering a written creditor claim to a decedent's accountant, trustee, executive assistant or other third party. A creditor who fails to ascertain the identity of the executor or administrator and/or who fails to assure that a written description of the creditor's claim is delivered directly to the executor or administrator (or, at the very least, to the attorney of record for the executor or administrator) runs a serious risk of having the claim time-barred. From a creditor's point of view, even if the holding of the appeals court in *Wilson v. Lawrence* is followed (rather than the contrary holding in *Jackson v. Stevens*), attempted "presentment" of a claim "indirectly" by delivering it to an

accountant or other agent of the decedent runs the risk that such "indirect" claim letter may not be forwarded to the executor/administrator or attorney for the estate before the 6-month claims deadline expires. At worst, if *Jackson v. Stevens* is followed, no "indirect" presentment of a creditor's claim will be honored, and the creditor's claim would be time-barred even if it was forwarded to the executor or administrator (or to the estate's attorney) within the 6-month claims period.

FINAL NOTE: In response to a motion by Lawrence (the executor) to certify a conflict between the holdings of *Wilson v. Lawrence* and *Jackson v. Stevens*, the Eighth District Court of Appeals certified the following questions for review by the Supreme Court of Ohio: "Whether R.C. 2117.06 allows for substantial compliance in the presentment requirements for a claim against an estate. And, if so, whether a plaintiff with a claim against a decedent's estate can meet his burden under R.C. 2117.06(A)(1)(a) to 'present' his claim '[t]o the executor or administrator in writing' when the claimant presents the claim to someone other than the fiduciary, who then submits the claim to the fiduciary within the statutory time frame under R.C. 2117.06." Lawrence (the executor) has petitioned the Supreme Court of Ohio to hear an appeal of the Eighth District's holding in *Wilson v. Lawrence*, both on the grounds of a certified conflict and on the general jurisdictional basis that the case presents a question of general or great public interest. As this article goes to press, the Supreme Court has just ruled on that it will hear the appeal.

BEYOND *CASTRO*'S TABLET WILL: EXPLORING ELECTRONIC WILL CASES AROUND THE WORLD AND RE-VISITING OHIO'S HARMLESS ERROR STATUTE

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I. INTRODUCTION

My three daughters will turn age 18 in years 2026, 2029, and 2031. What will Ohio's law of Wills be then? How will today's techie youth expect our testamentary laws to look tomorrow? Will the law keep pace with our reliance on changing technology? Should it?

Back in 2013,[1] I brought attention to the now familiar case *Estate of Castro*,[2] in which a purported will written and signed by testator and witnesses entirely in digital format on a computer tablet was admitted to probate in Lorain County. Since that time, I have uncovered cases involving electronic or similar wills presented for probate in other jurisdictions that would not comply with Ohio's current will execution formalities but nevertheless contain themes and factual circumstances that could help shape adjustments to Ohio law.

I presented these global cases and additional commentary at the 2015 Marvin R. Pliskin Advanced Probate and Estate Planning Institute, in a presentation titled, "Electronic Wills and the Future: When Today's Techie Youth Become Tomorrow's Testators." My 139-page presentation outline with statutes and foreign court opinions attached is available online[3] ("Pliskin Materials") and is referenced herein from time to time. This article summarizes some themes from that presentation.

II. REVIEW OF ESTATE OF CASTRO

The facts and ruling of *Estate of Castro* previously appeared in this Journal in late 2014 along with the Court's Judgment Entry and a copy of the probated will.[4] Accordingly, I will present an abbreviated summary here.

A. Summary

While at the hospital shortly before his death, Javier Castro, age 48, dictated his testamentary intentions to his brother, who recorded them on a Samsung tablet (a portable electronic device) using a stylus as a pen. Later, at a different hospital, Javier signed the will electronically on the tablet using the stylus in the presence of his brothers, who then using the stylus electronically signed their names as witnesses below the handwritten will on the tablet. Javier died a short time later and the brothers printed the electronic will onto paper and presented it for probate.

Ohio's requirements for a valid will are found in R.C. 2107.03, which provides:

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

In *Castro*, the Court began with the questions of whether Javier's digital document on the tablet was a "writing" and whether it was "signed." The Court answered both questions affirmatively.

Since Ohio's statutory chapter on Wills does not define "writing," Judge Walther turned to the chapter on "Crimes—Procedure," and relied on R.C. 2913.01(F). That section states that "writing," in the criminal context of theft and fraud "means any computer software, document, letter, memorandum, note, paper, plate, data, film, or other thing having in or upon it any written, typewritten, or printed matter, and any token, stamp, seal, credit card, badge, trademark, label, or other symbol of value, right, privilege, license, or identification." Using this borrowed definition of "writing" from the criminal code, the Court found Javier's will on the Samsung tablet was a "writing" for purposes of the law of wills because it "contains the stylus marks made on the tablet and saved with the application software."

The Court reasoned the purported will was "signed at the end by Javier" because the signature captured by the tablet application "is a graphical image of Javier's handwritten signature that was stored by electronic means on the tablet."

As good as Javier's do-it-yourself at the hospital handwritten electronic will was, it lacked an attestation clause above the witnesses' signatures. While the *Castro* opinion is not clear, it appears the lack of an attestation clause made the Court uncomfortable admitting the will under R.C. 2107.03. Judge Walther ultimately admitted Javier's electronic will to probate based on R.C. 2107.24(A), Ohio's modified version of the Uniform Probate Code's (UPC) Harmless Error Doctrine.[5] In summary, Section 2107.24(A) permits a probate court to rescue a noncompliant, defective will from invalidity if, after a hearing, the court finds by clear and convincing evidence that the decedent: (1) prepared or caused the document to be prepared, (2) signed the document and intended the document to constitute his or her will; and (3) signed the document in the conscious presence of two or more witnesses.

B. Ohio's Harmless Error Statute R.C. 2107.24(A) ("Treatment of document as will notwithstanding noncompliance with statute")

Of the only ten states[6] that have statutorily adopted the Harmless Error Doctrine, Ohio's modified version enacted in 2006 is perhaps the most limiting and the least forgiving of noncompliant wills. The UPC version ("clear and convincing evidence that the decedent intended the document or writing to constitute the decedent's will") and Restatement (Third) of Property version ("clear and convincing evidence that the decedent adopted the document as his or her will") are each simpler in approach.

Moreover, R.C. 2107.24(A), which is supposed to help non-compliant wills, is actually more restrictive than R.C. 2107.03 since R.C. 2107.24(A) mandates the will be signed in the conscious presence of the witnesses whereas R.C. 2107.03 also permits a testator the choice to later acknowledge his signature before witnesses.

Do the very few reported cases seeking to invoke Section 2107.24(A), which is now a decade old, suggest that Ohio codified the Harmless Error Doctrine in too rigid a manner? If more non-compliant wills are presented to probate on account of reliance on new technology, will our probate judges wish that 2107.24(A) was more flexible in cases where a decedent clearly intended a writing to constitute his or her will?

A comprehensive summary of the Harmless Error Doctrine and examples of court decisions in the U.S. accepting or rejecting the doctrine in the estate planning or probate context appear on pages 1.7-1.14 of my Pliskin Materials.

C. Is *Castro* a Signal?

The Court's decision in Castro stated, "Because

they did not have any paper or pencil, [Javier's brother] suggested that the Will be written on his Samsung Galaxy tablet."

Was there really no paper or pen available in the hospital within reasonable reach? Did Javier and his brother even ask or was their first instinct to start writing electronically on the tablet? With so much of their lives reliant on hand-held technology, will young adults and millennials today take the same actions as Javier and his brothers?

Does *Castro* (and the companion cases below) illustrate that emerging generations instinctively prefer to electronically record not just their daily life updates on mobile devices (and instantly publish them on Snapchat, Instagram, Twitter and Facebook) but now also their weightier testamentary wishes?

Does *Castro* advance the doctrine of "testamentary freedom" to include not only a testator's freedom to dispose of property to whom he/she wishes, but also deference to doing so in a medium or communication or non-paper "writing" of his or her choice?

Does *Castro* pave the way for other Ohio probate courts to admit to probate similar irregular or noncomplying "wills" prepared using current, emerging, and future technologies and methods?

Contrary to the conclusions expressed in an earlier article in this Journal,[7] this author believes that *Castro* has limited precedential value in Ohio. It was a case without a controversy as all interested persons wanted the will admitted to probate and the Court granted the request with apparently no practical, policy, procedural or factual arguments in opposition having been presented by any party, or discussed in the Court's opinion. Would the outcome have been different or at least a closer call if this was a real controversy with opposing parties and the assets and property interests subject to the dispute were more substantial?[8]

A critique of the Castro *opinion appears on pages 1.19-1.20 of my Pliskin Materials.*

III. CASES INVOLVING ELECTRONIC OR SIMILAR WILLS AROUND THE WORLD

While *Castro* was decided in our jurisdiction, courts in other jurisdictions have recently wrestled with other electronic will scenarios, none of which were cited by the *Castro* Court. Below are brief summaries of a few of them.

A. Printed Will Signed on Computer Using Stylized Cursive Signature Font

In *Taylor v. Holt*, 134 S.W.3d 830 (Tenn. Ct. App. 2003), the Court upheld admission to probate of a will signed not with an ink pen but instead using a computer generated signature.

In *Taylor*, the decedent prepared on his computer a one-page document purporting to be his last will and testament. The decedent asked two of his neighbors to witness his will. The decedent then "affixed a computer generated version of his signature at the end of the document in the presence of both" neighbors and both neighbors then each signed and dated the document below the decedent's computer generated signature.

The witnesses signed affidavits each stating that the decedent "personally prepared the Last Will and Testament on his computer, and using the computer affixed his stylized cursive signature in my sight and presence and in the sight and presence of the other attesting witness." The Court's opinion is silent as to how the witnesses signed the will, but it is presumed that after decedent used his computer to affix a cursive font signature to the electronic document, that he printed the document and had the witnesses sign the paper document. The facts in this case are not clear.

The decedent's sister challenged the will, arguing it was void because it did not contain her brother's signature. The Court nevertheless upheld admission of the will to probate, concluding:

> The computer generated signature made by Deceased falls into the category of "any other symbol or methodology executed or adopted by a party with intention to authenticate a writing or record," and, if made in the presence of two attesting witnesses, as it was in this case, is sufficient to constitute proper execution of a will. Further, we note that Deceased simply used a computer rather than an ink pen as

the tool to make his signature, and, therefore, complied with Tenn. Code Ann. § 32-1-104 by signing the will himself.

B. In Suicide Cases, Word Processing Document Still Electronically Stored on Computer Disk or Employer's Desktop Hard Drive or Personal Laptop

In *Rioux v. Coulombe* (1996), 19 E.T.R. (2d) 201 (Quebec Sup. Ct.) (Canada), the Court upheld the probate of a word processing document that was preserved on a computer disk.

In *Rioux*, the decedent committed suicide, leaving a note beside her body directing the finder to an envelope containing a computer disk. Handwritten on the disk was the phrase "This is my will / Jacqueline Rioux / February 1, 1996." The disk contained only one electronic file composed of unsigned directions of a testamentary nature. The file had been saved to computer memory on the same date on which the testator wrote in her diary that she had made a will on her computer. The *Rioux* Court acted pursuant to the jurisdiction's dispensing power, which specified the requirement that the imperfect will must "unquestionably and unequivocally [contain] the last wishes of the deceased."

A year earlier in *MacDonald v. The Master*, 2002 (5) SA 64 (N) (South Africa) the Court admitted to probate a will in the form of document electronically stored on hard drive of employer's computer.

In *MacDonald,* before committing suicide, the decedent (a senior IT specialist at IBM) left in his own handwriting four notes on a bedside table. One of the notes read, "I, Malcom Scott MacDonald, ID 5609. . ., do hereby declare that my last will and testament can be found on my PC at IBM under directory C:/windows/mystuff/mywill/personal."

A decade later in *Yazbek v. Yazbek and another* [2012] NSWSC 594 (Supreme Court of New South Wales) (Australia) the Court admitted to probate a Microsoft Word document titled "will.doc" created and stored on decedent's laptop and discovered by police after testator's suicide death.

See Appendix K of my Pliskin Materials for the Yazbek Court's lengthy yet masterful opinion setting forth a comprehensive analytical framework for electronic will cases. Paragraphs 113-120 of the opinion summarize the Court's conclusions as to whether the testator intended "will.doc," to be his will.

C. Video Recording Saved to DVD Labeled "My Will" and Web-cam Video Recording

In *Mellino v. Wnuk & Ors* [2013] SQC 336 (Supreme Court of Queensland) (Australia) the Court admitted to probate a video recording saved to a DVD that was made by the deceased immediately prior to his suicide, reasoning:

> I'm satisfied that the DVD is a document within the meaning of the section, and I'm also satisfied that the document embodies or was meant to embody the testamentary intentions of the deceased man. I think that is clear from the fact that he has written "my will" on the DVD itself and also from the substance of what he says in the video recording on the DVD. It is clearly made in contemplation of death, and the deceased man was found dead, having committed suicide, at some point after the video recording was made. He discusses his intention to suicide in the document. He is at some pains to define what property he owns, and it seems to me quite clear that, although very informal, what the document purports to do is to dispose of that property after death.
>
> Further, I am satisfied that the substance of the recording on the DVD demonstrates that the DVD itself without any more formality on the part of the deceased man would operate upon his death as his will. He comes very close to saying that exact thing informally, explaining that he's no good with paperwork and that he hopes that his recording will be sufficiently legal to operate to dispose of his property.

In *Estate of Sheron Jude Ladduhetti* (unreported, Supreme Court of Victoria, Sept. 20, 2013) (Australia) the Court admitted to probate a web-cam video recording categorized as an informal will.

D. Unsigned Document Emailed to Another

In *Van der Merwe v. Master of the High Court and another* (605/09) [2010] ZASCA 99 (Supreme Court of Appeal of South Africa) (Sept. 6, 2010), a draft will unsigned but emailed to a friend and beneficiary under the draft will, was admitted to probate and revoked a prior will. The Court reasoned:

> The appellant provided proof that the document had been sent to him by the deceased via e-mail, lending the document an aura of authenticity. It is uncon-

> tested that the document still exists on the deceased's computer. Thus it is clear that the document was drafted by the deceased and that it had not been amended or deleted.
>
> The document is boldly entitled 'TESTAMENT' in large type print (6 mm high), an indicator that the deceased intended the document to be his will. Furthermore, the deceased nominated the appellant as the sole beneficiary of his pension fund proceeds. This is an important and objective fact which is consonant with an intention that the appellant be the sole beneficiary in respect of the remainder of his estate. It is also of importance that the deceased had no immediate family and that the appellant was a long time friend and confidante. The fact that his previous will nominated the second respondent as his sole heir indicates that he had no intention of benefiting remote family members. The appellant's version of the mutual agreement to benefit each other exclusively by way of testamentary disposition is uncontested by the second respondent, the sole beneficiary of the prior will, and is supported by the fact that after the deceased had sent the document to the appellant, the latter executed a will nominating the deceased as his sole beneficiary—another objective fact. All of this leads to the inexorable conclusion that the document was intended by the deceased to be his will.

E. Document Created Online Using Legalzoom but Paper Version Never Signed

In *Litevich v. Probate Court*, 2013 Conn. Super. LEXIS 1158; 2013 WL 2945055 (Super. Ct. New Haven Dist. 2013) (Appeal from Dist. West Haven Probate Ct.), the Court refused to admit to probate a newer purported will prepared using commercial online drafting software since the printed version created was not signed or witnessed before decedent's death.

There were two wills at issue in *Litevich*. One was a paper 1991 will that fully complied with the statute. The other was a document created in 2011 through the online legal drafting service, Legalzoom. Plaintiff, advocating probate of the 2011 document, alleged that in preparing the Legalzoom will, testator (who worked in the laboratory at Yale's School of Medicine and was never married and had no children and no siblings) logged into her computer which likely had a password, created an account with Legalzoom, and completed a lengthy process to determine with specificity her exact wishes, including providing all her pertinent information and her social security number. Plaintiff argued that "testator's confirmation of the will prior to her final purchase, when combined with the authentication techniques the testator used and the testator's having provided her social security number to Legalzoom, was 'tantamount to a signature.' "

Legalzoom shipped the will to testator in the days immediately before she became ill and entered the hospital with her final illness. Testator asked a close friend to bring the Legalzoom will to the hospital. This friend was a 50 percent beneficiary and the named executor in the Legalzoom will. Testator did not sign the document in the hospital because she and the friend both mistakenly believed a notary's attestation was required and a notary was not available to come to the hospital until July 23, 2011. Testator lost capacity on July 22 and died on July 25.

The validity of the Legalzoom will was challenged on the grounds that it was not subscribed or signed by two witnesses.

The Court ruled that "there is no room for play in the language" of the required formalities in Connecticut's Statute of Wills and that Connecticut does not have a harmless error statute. The Court further stated, "Questions concerning whether alternative modern authentication techniques are equally reliable and/or more desirable are, instead, properly reserved for the legislature."

F. Messages on Left on iPhone Notes App Before Suicide

In *Re: Yu* [2013] QSC 322 (Supreme Court of Queensland, Nov. 6, 2013) (Australia) the Court admitted to probate as a will a message created and stored by the decedent in the notes application of his iPhone. Before committing suicide in 2011, the decedent "created a series of documents on his iPhone, most of them final farewells. One was expressed to be his last Will."

The jurisdiction's statute defined a "*document*" to "include any disc, tape or other article, or any material from which writings are capable of being produced or reproduced, with or without the aid of another article or device."

The applicable statutory three-part test the Court applied was whether: (a) there is a document, that (b) purports to state the testamentary intentions of the deceased, and (c) the deceased intended the document to form his will.

The *Re: Yu* Court considered the message on the smartphone a valid will reasoning:

> The document for which probate is sought, in my view, plainly satisfies that requirement. The document commenced with the words, "This is the last Will and Testament. . ." of the deceased, who was then formally identified, together with a reference to his address. The appointment of an executor, again, reflects an intention that the document be operative. The deceased typed his name at the end of the document in a place where on a paper document a signature would appear, followed by the date, and a repetition of his address. All of that, it seems to me, demonstrated an intention that the document be operative. Again, the instructions contained in the document, as well as the dispositions which appear in it, all evidence an intention that it be operative on the deceased's death. In particular, the circumstance that the document was created shortly after a number of final farewell notes, and in contemplation of the deceased's imminent death, and the fact that it gave instructions about the distribution of his property, all confirm an intention that the document be operative on his death. I am therefore satisfied that the deceased intended the document which he created on his iPhone to form his Will.

G. A View from Ohio and the Bench

What would the ruling be in each of the above cases if Ohio law had been applied? If you were the judge in a jurisdiction where testator's intention to constitute or adopt the purported will was the measuring legal standard, would you have admitted these purported wills to probate? Is Ohio's modified Harmless Error statute, R.C. 2107.24(A), an appropriate legal standard for these factual scenarios? Would each of the purported wills in these cases been deemed a "writing" and "signed" under *Castro*? Should Ohio define clearly "writing" and "signed" in the context of the law of wills for all probate courts to apply uniformly?

IV. CONDITIONS MAKING CLIMATE RIGHT FOR MORE ELECTRONIC OR SIMILAR WILLS

In an era where the Harmless Error Doctrine is taking root across the country and is already rooted in Ohio as evidenced by *Castro*—I believe four factors are making the landscape more fertile for testators to prepare more electronic or similar wills over which our probate judges will have to wrestle.

First, statutes like E-SIGN[9] and UETA,[10] now about 15-years old, have led to mainstream acceptance of electronic signatures in global and local commerce as being valid, secure, and normal.

Second, the widespread adoption of newer technologies is multi-generational and the rising generation has developed a dependence on mobile technology.

Third, for convenience and efficiency, there is increased use and accelerated acceptance of electronic signatures in legal matters. The U.S. Department of Education has for several years encouraged students to sign online an electronic Master Promissory Note. Signing and filing tax returns and court documents electronically is normal and is sometimes required. In some courts, judges and magistrates now sign court orders electronically.[11] Financial institutions and government agencies often permit signatures transmitted by fax and e-mail and accept copies in lieu of original documents. Several financial institutions have begun allowing (or requiring) account holders to change beneficiary designations for retirement, life insurance, and similar investment accounts directly online.

Fourth, a growing number of software vendors are aggressively promoting use of their digital or electronic signature technology as an efficient, secure, and valid method to efficiently execute legal documents. Popular vendors include Docusign, CudaSign (formerly SignNow), Dotloop, Inc., and e-SignLive by Silanis. More and more real estate transactions are being negotiated and finalized using the parties' electronic signatures that can be completed on a variety of mobile platforms with orderly coordination and electronic transmission of the document to various parties.

Wills aside, consider whether such electronic signature technology might have broader application for estate planning and probate attorneys. As examples, would such technology be ideal for: (a)

Signing non-testamentary trusts and acceptances of trusteeship? (b) Collecting signatures on probate administration documents, such as consents and waivers to beneficiaries and next of kin, if allowed by the court? (c) Gathering signatures on private settlement agreements or receipt, release, and indemnity agreements when many parties are scattered geographically? or (d) Signing powers of attorney and advance health care directives?

V. CONCLUSION: SHOULD ADJUSTMENTS TO OHIO LAW BE CONSIDERED?

I invite the OSBA Estate Planning, Trust and Probate Law Section leaders to consider forming a committee to: (a) study to what degree nonconforming wills are being prepared by the public or presented for probate across Ohio; (b) study existing legislative models and developments in other U.S. jurisdictions and countries abroad, such as Australia, Canada, and South Africa where electronic wills have been presented to probate with frequency in recent years, and to monitor court decisions there; (c) evaluate whether the time has come to further modify Ohio's law of wills, including: (i) R.C. 2107.03 (Method for Making a Will) with its undefined terms such as "writing" and "signed" and its restricted meaning of "conscious presence"; and (ii) R.C. 2107.24 (Treatment of Document as Will Notwithstanding Noncompliance with Statute) which is only partially forgiving and requires that the testator sign in the conscious presence of two witnesses with no opportunity for testator acknowledgement to those witnesses as permitted in R.C. 2107.03.

Following his decision in *Castro,* the local media quoted Judge Walther as saying he believes "the state legislature needs to update the law to address electronic wills. 'I can only think this is going to be utilized more and more, so it would be good to have some guidance,' "[12]

Pages 1.29-1.30 of my Pliskin Materials summarize a dozen options a legislative body might consider to provide such guidance.

In an increasingly paperless and mobile world, what will Ohio's law of wills be in 2031 when my youngest daughter attains testamentary capacity? What will she and her peers expect it to be? Has the time come for us as probate lawyers to start that legislative process?

ENDNOTES:

[1]Kyle B. Gee, Esq., Electronic Wills at our Fingertips: Should They Be Admitted to Probate? Cleveland Metropolitan Bar Journal (December 2013); Discussed by author during Ohio Case Law and Statutory Update, 40th Annual Estate Planning Institute, Cleveland Metropolitan Bar Association (Cleveland, October 25, 2013).

[2] In re Estate of Javier Castro, Deceased, 2013-ES-00140 (Ct. Comm. Pl. Lorain Cnty., Probate Div., Ohio, June 19, 2013) (James T. Walther, Judge).

[3]Available on this author's attorney profile page here: http://www.sssb-law.com/media/1140/chapter_1_gee_electronic_wills_and_the_future_2015_pliskin_2015918.pdf.

[4]Michael Tipton, 2015 J.D. candidate, Electronic Wills Find Support in Ohio Case Law, 25 OH Prob. L.J. 53 (Nov./Dec. 2014).

[5]UPC § 2-503, published by the National Conference of Commissioners on Uniform State Laws, full text with comments available online: http://www.uniformlaws.org/shared/docs/probate%20code/2014_UPC_Final_apr23.pdf (last visited 8/21/2015).

[6]States having adopted UPC § 2-503 in full include: Hawaii (Haw. Rev. Stat. § 560:2-503), Michigan (Mich. Comp. Laws § 700.2503), Montana (Mont. Code § 72-2-523), New Jersey (N.J. Stat. § 3B:3-3), South Dakota (S.D. Codified Laws § 29A-2-503), and Utah (Utah Code § 75-2-503). States having adopted a modified version of UPC § 2-503 include: California (Cal. Prob. Code § 6110(c)(2)), Colorado (Colo. Rev. Stat. § 15-11-503), Ohio (R.C. § 2107.24), and Virginia (Va. Code § 64.2-404). List of jurisdictions may not be complete and readers should conduct independent research. See http://www.uniformlaws.org/Act.aspx?title=Probate%20Code for additional information.

[7]Tipton, Electronic Wills Find Support in Ohio Case Law, 25 OH Prob. L.J. at 55-56.

[8]Consider the hypothetical situation in which a new self-made electronic will, hastily prepared by decedent without legal counsel, seeks to alter the disposition of tangible personal property in a prior will but also unintentionally revokes a carefully planned and attorney-drafted exercise of a power of appointment in the prior will, which power pertains to significant assets in ancestral trusts.

[9]Electronic Signatures in Global and National Commerce Act (E-Sign), 15 U.S. Code Chapter 96 (15 U.S.C.A. § 7001) was enacted June 30, 2000 to facilitate the use of electronic records and electronic

signatures in interstate and foreign commerce by ensuring the validity and legal effect of contract entered into electronically. The general intent of E-Sign, described in its first section, is that "a signature, contract, or other record relating to a transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form."

[10]Uniform Electronic Transactions Act (UETA). This model act was developed to provide a legal framework for the use of electronic signatures and records in government or business transactions. UETA makes electronic records and signatures as legal as paper records and manually signed signatures. UETA has been adopted by 47 states, D.C., Puerto Rico, and the Virgin Islands. Illinois, New York and Washington have not adopted the Uniform Act but have their own statutes pertaining to electronic transactions. Ohio adopted UETA in 2000 as R.C. Chapter 1306. Note that R.C. 1306.02 (Scope of Chapter—Exceptions) states that Ohio's UETA shall apply to electronic records and electronic signatures relating to a transaction, but not a transaction if that transaction is governed by "(B)(1) a law governing the creation and execution of wills, codicils, or testamentary trusts."

[11]See, e.g. Cuyahoga County Probate Court, Local Rule 19.

[12]Brad Dicken, Judge Rules Will Written and Signed on Tablet is Legal, The Chronicle-Telegram Online (June 25, 2013).

PORTABILITY: THE FINAL REGULATIONS

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INTRODUCTION

Over five years have passed since President Obama signed into law the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (the "2010 Act") on December 17, 2010.[1] The 2010 Act gave rise to the estate planning concept of *portability*, which is the subject of this article.[2]

In the face of the expiration of portability and many of the other provisions of the 2010 Act, President Obama signed into law the American Taxpayer Relief Act of 2012 (the "2012 Act") on January 2, 2013.[3] The 2012 Act made permanent the portability provisions of the 2010 Act (with one minor technical modification).[4] Finally, at the eleventh hour, the Department of the Treasury (the "Treasury Department") and the Internal Revenue Service (the "IRS") released final regulations on portability effective as of June 12, 2015, and removed the temporary regulations published on June 18, 2012.[5]

The final regulations on portability provide general guidance with respect to the applicable exclusion amount, as well as the requirements and rules with respect to portability. This article focuses on the key clarifications made by the final regulations, and identifies some important areas of concern that the final regulations failed to address.

The estate planning implications of portability and the profound changes that portability will continue to have in the estate planning for married couples are discussed in detail in Saccogna, *Portability: Estate Planning in the New Frontier*, 25 PLJO 6 (July/August 2015).[6] Additional information and numerous illustrative examples concerning (i) the concept of portability, (ii) the calculation of a surviving spouse's estate tax applicable exclusion amount under various scenarios applying portability, (iii) the application of portability for federal gift and generation-skipping transfer ("GST") tax purposes, and (iv) the requirements for making a valid portability election, are all outlined in Shearer and Saccogna, *Portability: Now It's For Real*, 23 PLJO 208 (May/June 2013).

THE FINAL PORTABILITY REGULATIONS: KEY CLARIFICATIONS AND NOTABLE OMISSIONS

Availability of Extension of Time to Make Portability Election. Generally, a portability election is effective only if made by the executor of the deceased spouse's estate on a federal estate tax return that is filed within the time prescribed by law (including extensions) for filing such a return.[7] Prior to the issuance of the final portability regulations, there existed a question as to the extent to which, if any, an extension of time under Treasury Regulations Sections 301.9100-2 and 301.9100-3 (the so-called "9100 relief provisions") is available to make a portability election.

In the wake of the 2010 Act and the 2012 Act,

the Treasury Department and the IRS published guidance regarding the availability of an *automatic* extension of time within which executors of certain estates under the filing threshold of IRC Section 6018(a) could file an estate tax return for the purpose of making a portability election.[8] This type of relief is *not* included in the final portability regulations.

Nevertheless, the final regulations do provide that an extension of time to elect portability may be granted under the rules set forth in Treasury Regulations Section 301.9100-3 to estates with a gross estate value less than the filing threshold amount (which estates are *not* otherwise required to file a federal estate tax return).[9] The rationale for this regulation is that the due date for the portability election in such a case is prescribed *by regulation*, and not by statute.[10]

The final regulations also provide that an extension of time to make the portability election will *not* be granted under Treasury Regulations Section 301.9100-3 to any estate that is *required* to file a federal estate tax return under IRC Section 6018(a) because the value of the gross estate equals or exceeds the filing threshold amount.[11] This is because, in such a case, the due date for the portability election is prescribed *by statute,* and the 9100 relief provisions only apply to an election the due date of which is prescribed by regulation.[12]

Effect of Portability Election In Case Where DSUE Amount Is Not Certain or Changes. As a result of the 2010 Act (as extended by the 2012 Act), Congress amended the Internal Revenue Code to allow for the portability of the deceased spouse's unused basic exclusion amount for a surviving spouse of a decedent who dies after 2010 if the executor of the deceased spouse's estate makes a proper election on a timely filed federal estate tax return that calculates the deceased spousal unused exclusion amount (the "DSUE amount").[13]

A commentator suggested that the final regulations include language dealing with the issue of whether or not an estate can make a "protective" portability election if a DSUE amount is not reflected on an otherwise complete and properly prepared federal estate tax return at the time of its filing, but subsequent adjustments to the tax return would result in a DSUE amount of the decedent. An example of such an adjustment would be if the estate later became entitled to a deduction under IRC Section 2053 for a payment which reduces the estate tax and results in unused exemption of the decedent.

In response to this suggestion, the final regulations clarify that the portability election requirements, including the DSUE amount computation requirement, are satisfied by the timely filing of a complete and properly prepared estate tax return, as long as the executor has *not* elected out of portability.[14]

Thus, in the foregoing example, the recomputed DSUE amount would be available to the decedent's surviving spouse, and there is no need for a protective election. As a result of this clarification, it will be important for an executor in this situation *not* to elect out of portability even if the executor believes that, at the time of filing, the DSUE amount is zero. Notably, however, the Treasury Department and the IRS declined to include provisions in the final regulations outlining the facts and circumstances in which a timely filed federal estate tax return would be considered to be so deficient as to render it incomplete or not properly prepared for these purposes.

Persons Allowed to Make the Portability Election. Several commentators asked the Treasury Department and the IRS to issue final regulations that would permit a decedent's surviving spouse who is not the executor of the decedent's estate as defined in IRC Section 2203 to file a federal estate tax return and make the portability election for the estate under certain circumstances.[15]

The Treasury Department and the IRS flatly rejected this request, pointing out that the Internal Revenue Code allows only the executor of the decedent's estate to file the estate's estate tax return and make the portability election, and that the 2012 temporary regulations addressed the circumstances in which an appointed or non-appointed executor may file the return and elect portability.[16] Accordingly, the final regulations on this subject

adopt the rules of the 2012 temporary regulations without change.[17]

Requirement of a "Complete and Properly Prepared" Estate Tax Return for Portability Election. On March 23, 2015, Troy Lewis, of the American Institute of Certified Public Accountants (AICPA), issued a letter to the IRS with several proposals with respect to the portability election.[18] One such proposal suggested that the IRS prepare a shortened, simplified estate tax return, a "Form 706-EZ," to be used by estates that are not otherwise required to file an estate tax return but do so for the sole purpose of electing portability.[19] Mr. Lewis and the AICPA reasoned that this measure would make the portability election easier and less expensive to complete for small estates.[20]

The Treasury Department and the IRS chose not to adopt this suggestion in the final regulations, pointing out that (i) the legislative history of the 2010 Act suggests that estates making the portability election that are not otherwise required to file a federal estate tax return under IRC Section 6018(a) are intended to be subject to the same filing requirements that apply to estates that are required to file an estate tax return under IRC Section 6018(a), and (ii) the expected administrative burdens in administering the federal estate tax with an abbreviated estate tax return form far outweigh the purported benefits to taxpayers.[21]

Special Rules for Qualified Domestic Trusts (QDOTs). The 2012 temporary regulations provided that, with respect to a QDOT created for a decedent's surviving spouse who is not a U.S. citizen, the earliest date that such a decedent's DSUE amount may be included in determining the applicable exclusion amount of the surviving spouse or the surviving spouse's estate is the date of the event that triggers the final estate tax liability of the decedent under IRC Section 2056A.[22] A commentator challenged this delay in the surviving spouse's ability to use the decedent's DSUE amount in the case where the surviving spouse becomes a citizen of the United States after the decedent's estate tax return is filed and after property passes to a QDOT for such surviving spouse's benefit.

The final regulations make clarifying changes to the language of the 2012 temporary regulations regarding QDOTs, and state that, if the surviving spouse of the decedent becomes a United States citizen *and* the requirements under IRC Section 2056A(b)(12) and the corresponding regulations are met so that the tax imposed by IRC Section 2056A(b)(1) no longer applies, then the decedent's DSUE amount is no longer subject to any adjustment and thus will become available to the surviving spouse for transfers as of the date that the surviving spouse becomes a citizen of the United States.[23]

Availability of DSUE Amount to Surviving Spouse Who Becomes a United States Citizen. At the urging of commentary on the subject, the Treasury Department and the IRS have included a new rule in the final regulations making clear that a surviving spouse who becomes a citizen of the United States after the death of the deceased spouse is permitted to take into account the DSUE amount of the deceased spouse as of the date that such surviving spouse becomes a United States citizen, *so long as* the decedent's estate has made the portability election.[24] This rule, however, does not apply when the special rule regarding QDOTs in the final regulations, discussed above, applies.[25]

Accordingly, it will be essential in non-QDOT situations for the executor of the deceased spouse's estate to make a portability election, even though the surviving spouse is not expected to become a citizen of the United States, in order to allow the surviving spouse to use the DSUE amount of the deceased spouse if the surviving spouse ever later becomes a citizen of the United States. Of course, the surviving spouse could advise the executor not to make the portability election because the surviving spouse does not intend to become a United States citizen, and then later change course. Advisors thus ought to carefully document their files regarding these discussions and decisions.

Effect of Portability Election on Application of Rev. Proc. 2001-38. Perhaps the most notable—and controversial—omission from the final regulations is the much sought-after guidance on the application of Rev. Proc. 2001-38[26] ("Rev. Proc. 2001-38") when the executor of an estate makes a portability election under IRC Section 2010(c)(5)(A)

and also makes a qualified terminable interest property ("QTIP") election under IRC Section 2057(b)(7).

Many advisors do not believe that Rev. Proc. 2001-38 poses any problems in this area. Some, however, remain concerned that the IRS may use Rev. Proc. 2001-38 to prevent the use of the "single QTIP-eligible trust" approach being employed by advisors today to plan for portability for married couples.[27] The idea behind this approach is for the first spouse to die to leave all of his or her assets to a single QTIP-eligible trust for the benefit of the surviving spouse; the executor of the deceased spouse's estate would then (i) make an IRC Section 2056(b)(7) QTIP election over the entire trust, (ii) make a reverse QTIP election to utilize the deceased spouse's remaining GST tax exemption,[28] and (iii) make a portability election in order to port the deceased spouse's DSUE amount to the surviving spouse.[29] In this way, the planner seeks to solve all of the key estate, GST, and income tax problems by porting the DSUE amount of the deceased spouse to the surviving spouse, utilizing the remaining GST tax exemption of the deceased spouse, and achieving a second income tax basis step-up on the appreciated QTIP assets remaining in the trust at the surviving spouse's death.[30]

Some planners think that it is not entirely clear that this approach will succeed, though, at least in cases where a QTIP election is not necessary to reduce the estate tax liability of the estate of the first spouse to die to zero.[31] This is because Rev. Proc. 2001-38 provides that the IRS will ignore a QTIP election that is not necessary to reduce the estate tax liability of a decedent's estate to zero.[32] Accordingly, if the deceased spouse's estate is under the filing threshold, and if a portability election is made, then a QTIP election would not be needed to reduce the estate tax liability to zero (because such liability is already zero) and thus, Rev. Proc. 2001-38 could literally apply to preclude the QTIP election. Presumably, this result would *also* nullify the reverse QTIP election for GST tax purposes and thereby cause the waste of the unused GST tax exemption of the first spouse to die.[33]

Several reasons suggest that a valid QTIP election is possible even when a portability election is made.[34] First, the purpose of Rev. Proc. 2001-38 is to provide relief to a decedent's estate by preventing an inadvertent or erroneous QTIP election from undermining the proper creation and funding of a credit shelter trust designed to utilize the decedent's remaining estate tax exemption where a QTIP election was not necessary to zero out the estate tax. Second, it is doubtful whether the IRS may rely on a revenue procedure to invalidate a statutory election (*i.e.*, the QTIP election, and, correspondingly, the reverse QTIP election).[35] Third, the portability temporary regulations appeared to contemplate a QTIP election made on the same federal estate tax return on which a portability election is made where the return is not otherwise required to be filed.[36] The final portability regulations appear to also contemplate this, as the Treasury Department and the IRS did not modify the final portability regulations in this regard.[37]

A further reason is that Rev. Proc. 2001-38 does not operate automatically and the language of Rev. Proc. 2001-38 itself suggests that the estate, and *not* the IRS, is the proper party to trigger the application of the procedure by producing sufficient evidence showing that the estate is entitled to relief. This argument, however, is subject to debate given the estate inclusion battles between estates and the IRS over the jointly owned property rules and regulations under IRC Section 2040(a). The regulations under IRC Section 2040 provide that the entire value of jointly held property is included in a decedent's gross estate unless the executor submits facts sufficient to show that such property was not acquired entirely with consideration furnished by the decedent, or was acquired by the decedent and the other joint owner or owners by gift, bequest, devise, or inheritance.[38] Executors of the estates of joint owners who were the first joint owner to die argued that these regulations permitted them to decide whether to include the entire property in the gross estate of the decedent (and thereby obtain the IRC Section 1014 basis step-up) merely by declining to show any consideration provided by the surviving co-owner(s). The problem with this argument, though, is that IRC Section 2040(a) itself states that gross estate inclusion occurs except to the extent that the property may be shown to have originally belonged to the surviving

co-owner. Some courts held favorably in this regard that the entire property was includible in the gross estate of the first joint owner to die, *unless* the executor of such estate provided sufficient evidence of the survivor's contributions.[39]

The Tax Court, however, later adopted the IRS' position that *either* the joint owner's estate *or* the IRS could prove the surviving joint owner's contribution to the joint property.[40]The Tax Court's adoption of the views of the IRS in these cases shows that, despite the language of Rev. Proc. 2001-38 that appears to trigger the procedure's application only upon the affirmative action of the executor of the estate, the IRS may nevertheless be able to invoke Rev. Proc. 2001-38 itself to void an attempted QTIP election in the case where an estate tax return is filed solely to make the portability election and where the QTIP election is not necessary to zero out the federal estate tax.

Thus, advisors eagerly anticipated that the Treasury Department and the IRS would provide guidance on this important question in the final portability regulations. But alack and alas, the Treasury Department and the IRS chose *not* to do so, stating instead that they intend to provide future guidance, by publication to the Internal Revenue Bulletin, to clarify whether a QTIP election made under IRC Section 2056 (b)(7) may be disregarded and treated as null and void when an executor has elected portability of the DSUE amount under IRC Section 2010(c)(5)(A).[41] The timing and substance of any such future guidance remain a mystery.

Until the Treasury Department and the IRS act on this issue, then, caution would appear to be the proper course in planning for the use of the single QTIP-eligible trust approach. Trust and estate attorneys ought to counsel their clients to go ahead and use this approach and plan to make the QTIP, reverse QTIP, and portability elections, but only if the clients are willing to assume the risk that the IRS may ultimately issue negative guidance that would prevent this approach from working as intended. Of course, alternate planning options should always be considered as well.

As a final thought on this issue, planners working with this type of estate plan for clients should consider including language in the IRS Form 706 of the deceased spouse's estate indicating the intention to make the QTIP election in order to establish the deceased spouse's DSUE amount and port that amount to the surviving spouse via the portability election, *even though* the QTIP election is not needed or effective to reduce the federal estate tax liability of the deceased spouse's estate.

Order of Credits. One commentator suggested a rule to apply in computing the DSUE amount that would provide that the tentative tax is equal to the net estate tax after the application of all available credits.[42] The commentator argued that the applicable credit amount of the deceased spouse should not be applied to the extent that one or more of the estate tax credits under IRC Sections 2012 through 2015 are available to reduce the estate tax of such deceased spouse's estate.[43]

Because the amount of each allowable credit under IRC Sections 2012 through 2015 can be determined only after subtracting the applicable credit amount determined under IRC Section 2010 from the tax imposed by IRC Section 2001, the amount of any credits under IRC Sections 2012 through 2015 are not available, or remain unused, to the extent that the applicable credit amount is applied to reduce the tax imposed by IRC Section 2001 to zero.[44] Accordingly, the commentator's proposal would, if accepted, have the effect of increasing the DSUE amount to be ported to the surviving spouse in these cases.

The Treasury Department and the IRS pointed out, however, that the rules set forth in IRC Section 2010(c)(4) for calculating the DSUE amount do not take into account any of the unused credits arising under IRC Sections 2012 through 2015.[45] Thus, the Treasury Department and the IRS concluded that no adjustment to the calculation of the DSUE amount on account of any unused credits is warranted, and issued clarifying final regulations providing that a deceased spouse's estate's eligibility under IRC Sections 2012 through 2015 for credits against the estate tax does *not* impact the computation of the DSUE amount.[46]

CONCLUSION

Portability and the many complicated estate

planning and estate administration issues it carries with it are a reality. Estate planners should make portability a point of discussion with virtually all of their married clients in addition to those of their clients who are executors of estates involving a surviving spouse. Planners, however, need to fully understand and inform their clients about portability's rules of the road, including those set forth in the final regulations, in order to best advise their clients. Likewise, planners need to keep abreast of future developments involving portability, particularly given the important questions that remain unanswered, such as the applicability of Rev. Proc. 2001-38.

ENDNOTES:

[1]Pub. L. 111-312, H.R. 4853, 124 Stat. 3296.

[2]Id. at §§ 301 et seq.

[3]Pub. L. 112-240, H.R. 8, 126 Stat. 2313.

[4]Id. at §§ 101(a)(2), 101(c)(2).

[5]T.D. 9725, 80 Fed. Reg. 34279 (June 16, 2015).

[6]In Obergefell v. Hodges, 576 U.S. _____ (2015), decided on June 26, 2015, the United States Supreme Court held that the Fourteenth Amendment to the United States Constitution guarantees a fundamental right to the recognition and provision of same-sex marriage. The case requires all states to (i) issue a marriage license between people of the same gender, and (ii) recognize same-sex marriages that are validly performed in other jurisdictions.

[7]I.R.C. § 2010(c)(5)(A).

[8]See Notice 2012-21, 2012-10 IRB 450; Rev. Proc. 2014-18, 2014-7 IRB 513.

[9]See Treas. Regs. § 20.2010-2(a)(1).

[10]See Rev. Proc. 2014-18, 2014-7 IRB 513, Section 2.03.

[11]See Treas. Regs. § 20.2010-2(a)(1).

[12]See I.R.C. §§ 2010(c)(5)(A), 6075(a), 6018(a); Treas. Regs. § 301.9100-1(b).

[13]I.R.C. §§ 2010(c), 2505(a).

[14]See Treas. Regs. §§ 20.2010-2(b), 20.2010-2(a)(7), 20.2010-2(a)(3)(i).

[15]See 2015 Tax Notes Today 56-13 (March 24, 2015).

[16]T.D. 9725, 80 Fed. Reg. 34279 (June 16, 2015), at Section 3 of Supplemental Information; See I.R.C. § 2010(c)(5), Temporary Regulation § 20.2010-1T.

[17]See Treas. Regs. §§ 20.2010-2(a)(6)(i), 20.2010-2(a)(6)(ii).

[18]See 2015 Tax Notes Today 56-13 (March 24, 2015).

[19]Id.

[20]Id.

[21]See T.D. 9725, 80 Fed. Reg. 34279 (June 16, 2015), at Section 4 of Supplemental Information; "Technical Explanation of the Revenue Provisions Contained in the 'Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010' Scheduled for Consideration by the United States Senate," J. Comm. on Tax'n, 111th Cong., JCX-55-10 (December 10, 2010).

[22]See Temporary Regulation § 20.2010-3T(c)(2).

[23]See Treas. Regs. §§ 20.2010-2(c)(4), 20.2010-3(c)(3), 25.2505-2(d)(3).

[24]See Treas. Regs. §§ 20.2010-3(c)(2), 25.2505-2(d)(2).

[25]Id. See also Treas. Regs. §§ 20.2010-3(c)(3), 25.2505-2(d)(3).

[26]Rev. Proc. 2001-38, 2001-1 C.B. 1335.

[27]See Saccogna, Portability: Estate Planning in the New Frontier, 25 PLJO 6 (July/August 2015).

[28]I.R.C. § 2652(a)(3).

[29]See Saccogna, Portability: Estate Planning in the New Frontier, 25 PLJO 6 (July/August 2015).

[30]Id.

[31]See Rev. Proc. 2001-38, 2001-1 C.B. 1335.

[32]Id.

[33]I.R.C. § 2652(a)(3); Treas. Regs. §§ 26.2652-2(a), 26.2652-2(b).

[34]See Franklin, Law & Karibjanian, Portability - The Game Changer (American Bar Association Real Property, Trust & Estate Law, January 2013).

[35]See Aucutt, ACTEC Capital Letter No. 34, Priority Guidance Plan Published, Commissioner Nominated (Aug. 12, 2013).

[36]See Temporary Regulation § 20.2010-2T(a)(7)(ii)(A)(4).

[37]See Treas. Regs. § 20.2010-2(a)(7)(ii)(A)(4).

[38]See Treas. Regs. § 20.2040-1(a)(2).

[39]See Tuck v. United States, 282 F.2d 405 (9th Cir. 1960); English v. United States, 270 F.2d 876 (7th Cir. 1959); Estate of Saunders v. Comm., 14 T.C. 534 (1950); and Rule v. United States, 105 Ct. Cl. 176, 63 F. Supp. 351 (1945).

[40]See Madden v. Comm., 52 T.C. 845 (1969); and Estate of Fleming v. Comm., T.C. Memo. 1974-377.

[41]T.D. 9725, 80 Fed. Reg. 34279 (June 16, 2015), at Section 8 of Supplemental Information.

[42]T.D. 9725, 80 Fed. Reg. 34279 (June 16, 2015), at Section 10 of Supplemental Information.

[43]Id.

[44]Id.

[45]Id.

[46]See Treas. Regs. § 20.2010-2(c)(3).

INTERPRETATION AND REFORMATION OF WILLS AND TRUST INSTRUMENTS: AMBIGUITIES, MISTAKES, AND EXTRINSIC EVIDENCE

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INTRODUCTION

The current law of wills in Ohio addresses ambiguities, mistakes, and extrinsic evidence with three fundamental rules. Two of them are with respect to ambiguous wills, while the third addresses alleged mistakes in unambiguous wills. The two rules with respect to ambiguous wills differ depending on whether the ambiguity is patent or latent. As set forth in Ohio Jurisprudence, "[a] patent ambiguity is one that appears on the face of the instrument."[1] For example, a devise of "the sum of two hundred thousand dollars ($25,000)" is patently ambiguous.[2] By contrast, "[a] latent ambiguity is one that is not apparent from the language used or from the face of the instrument."[3] For example, there is a latent ambiguity in a devise "to my cousin John" if extrinsic evidence "reveals that the testator had no cousin named John when he executed his will but did then have a nephew named John and a cousin named James."[4]

Ohio's three fundamental rules for interpreting wills with respect to ambiguities, mistakes, and extrinsic evidence are:

1. If there is not a patent or latent ambiguity with respect to the will, extrinsic evidence that the testator intended a different disposition than that dictated by the plain meaning of the will's language is not admissible to reform the will to correct the mistake.[5]

2. If the will includes a patent ambiguity, the intention of the testator cannot be supplied by oral evidence (although "[extrinsic] evidence is admissible to show the situation of the testator and all the relevant facts and circumstances surrounding the time of making the will, for the purpose of resolving [the] patent ambiguity").[6]

3. If there is a latent ambiguity, extrinsic evidence is admissible to interpret or apply the language of the will to resolve the ambiguity.[7]

The ongoing viability of these rules for wills is uncertain.

EXTENSION OF THE OHIO TRUST CODE'S REFORMATION DOCTRINE TO WILLS

Under Section 5804.15 of the Ohio Trust Code (the "OTC"), extrinsic evidence is admissible to reform the terms of a trust, even if they are unambiguous, if it can be proven with clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake.[8] Particularly noteworthy about Section 5804.15 are two things. First, it changed pre-OTC law, under which the rule barring the admission of extrinsic evidence when a will was unambiguous also applied to trust instruments.[9] Second, it likely applies to testamentary as well as inter vivos trusts.[10]

Thus, if a will includes mistaken, but unambiguous, terms for a testamentary trust, extrinsic evidence of the testator's true intent may be admissible. Whether that will be the case will depend on the nature of the mistake, as discussed in the next section of this article. If the mistake is of the kind that can be corrected, and the evidence of it is clear and convincing, the court is authorized by Section 5804.15 to reform the mistaken provisions in the will for the testamentary trust. By contrast, under current Ohio law, if the same will included mistaken, but unambiguous, terms for a gift not made in trust, extrinsic evidence of the mistake apparently would not be admissible to reform the will to correct the mistake, regardless of the nature of the mistake and regardless of whether the extrinsic evidence was clear and convincing.[11] Similarly, and perhaps more importantly given how common revocable trusts are in Ohio, if a decedent had used a revocable trust instrument to dispose of

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his or her property at death and the instrument included a mistaken, but unambiguous term, the trust instrument could be reformed to correct the mistake if it was correctable under the reformation doctrine and evidence of it was clear and convincing. By contrast, if the decedent instead had used a will to dispose of his or her property and the will included the same mistaken, but unambiguous, terms (that were not related to a testamentary trust) under current Ohio law the will could not be reformed to correct the mistake, regardless of whether the evidence of the mistake was clear and convincing.

Perhaps those anomalies would be enough to persuade an Ohio court to reject the no-reformation, plain meaning rule for wills (without regard to whether the mistake was with respect to a trust created by the will).[12] There is substantial support for a court doing so. First, if clear and convincing evidence is sufficient to correct a mistake in the terms of an unambiguous will as to a trust it creates, or to correct a mistake in the terms of an unambiguous revocable trust instrument the decedent used as a will substitute, why shouldn't it be sufficient to correct other mistaken terms of a will? Second, in 2008, the Uniform Probate Code was amended to authorize courts to reform mistaken, but unambiguous wills.[13] Third, since then, at least eight states have enacted legislation allowing the reformation of wills.[14] Fourth, the Restatement (Third) of Property also recently endorsed reforming wills to correct mistakes that are proven with clear and convincing evidence.[15] Finally, the California Supreme Court and a lower court in New York have recently adopted the wills reformation doctrine, without statutory authority for doing so.[16]

MISTAKES SUBJECT TO CORRECTION UNDER THE REFORMATION DOCTRINE

With respect to the question of what constitutes a mistake that can be corrected by reformation under R.C. § 5804.15, for trusts, and with respect to non-trust provisions of wills, if Ohio law is changed to permit their reformation, the Restatement limits the reformation doctrine's reach as follows:

> Reformation is a rule governing mistakes in the content of a donative document, in a case in which the donative document does not say what the transferor meant it to say. Accordingly, reformation is not available to correct a failure to prepare and execute a document (Illustration 1). Nor is reformation available to modify a document in order to give effect to the donor's post-execution change of mind (Illustration 2) or to compensate for other changes in circumstances (Illustration 3).
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> Illustrations:
>
> 1. G decided to leave his estate to his niece, X. G orally communicated his intent to X, mistakenly thinking that he could effectuate his intent in this manner. Thereafter G died intestate, leaving his sister, A, as his sole heir. Because G did not reduce his testamentary intent to writing and execute it as required by the Statute of Wills, X cannot invoke the reformation doctrine to implement G's true intent. G's mistake did not refer to specific terms in a donative document, because G never executed a document. There is no document to reform.
>
> 2. G validly executed a will that devised his estate to his sister, A. After execution, G formed an intent to alter the disposition in favor of A's daughter, X, in the mistaken belief that he could substitute his new intent by communicating it to X orally. G's oral communication to X does not support a reformation remedy. Although a donative document exists that could be reformed by substituting "X" for "A," the remedy does not lie because G's will was not the product of mistake. The will when executed stated G's intent accurately. G's mistake was his subsequent failure to execute a codicil or a new will to carry out his new intent. This is a mistake of the same sort that G made in Illustration 1 in not making a valid will in the first place.
>
> 3. G's will devised his government bonds to his daughter, A, and the residue of his estate to a friend. Evidence shows that the bonds are worth only half of what they were worth at the time of execution of the will and that G would probably have left A more had he known that the bonds would depreciate in value. This evidence does not support a reformation remedy. G's mistake did not relate to facts that existed when the will was executed.[17]

In the recent California case adopting the wills reformation doctrine, *In re Estate of Duke*[18], the California Supreme Court distinguished between (i) cases in which there is a mistake with respect to the testator's actual specific intent at the time the will was executed, for which reformation is available, and (ii) cases in which it is alleged that the testator had a more general intent that was not accomplished by the will as written, for which refor-

mation would not be available.[19] In *Duke*, T executed a valid holographic will leaving his estate to his wife. The will further provided that if they died at the same time, specified charities would inherit his estate. The will did not address the contingency of his wife predeceasing him, which is what occurred. The charities' argument, which the Court held would support reformation of the will if proven with clear and convincing evidence, was that when T executed the will, he specifically intended the charities to take if his wife predeceased him. The Court's discussion of a case involving a more general intent of a testator, that would not be accomplished by the will as written and that would not support reformation, was as follows:

> An example of an error involving general intent would be a case in which a testator intended in his or her will to provide adequate resources to one of the will's beneficiaries to support that beneficiary for a lifetime, but the specific gift set forth in the will proves to be inadequate for that purpose. Thus, that will accurately sets forth the testator's specific intent with respect to the distribution of assets, but due to a mistake with respect to the value of those assets or the needs of the beneficiary, the will fails to effect the testator's intent to provide adequate assets to support the beneficiary. In contrast to cases in which the alleged error is in the rendering of the specific terms intended by the testator, cases in which the alleged error is in failing to accomplish a general intent of the testator would require a court to determine the testator's putative intent: if the testator had known of the mistake, how would the testator have changed the will?[20]

A 1996 Ohio case decided by the Fourth District Court of Appeals, *Church v. Morgan*,[21] presents an interesting set of facts for considering the possible application of a wills reformation doctrine. Minnie Francis Lacy executed her will in her lawyer's office. Among its dispositive provisions was a specific bequest to her niece, Spring Fleming, of all funds in a specified savings account at a specified bank. At that time, the account had more than $94,000 in it. Ms. Lacy had been driven to her lawyer's office by a long-time friend, Samuel Church. Mr. Church, who was an accountant, was Ms. Lacy's agent under her power of attorney and executor under her will. On the way home from the lawyer's office, Mr. Church (who later testified that at that time, he had no knowledge of the specific bequest of the savings account to Ms. Fleming), suggested to Ms. Lacy that she should consider transferring money from her low-yielding savings accounts to higher-yielding certificates of deposit. The two of them then retrieved Ms. Lacy's passbooks for her savings accounts and went to her bank. There, Mr. Church arranged for the withdrawal of funds from her savings accounts and the purchase of certificates of deposit. Included among the withdrawals was $90,000 from the savings account that was the subject of the specific bequest in Ms. Lacy's will to Ms. Fleming. Because Mr. Church did not have the power of attorney with him, Ms. Lacy signed the necessary documents at the bank. According to Mr. Church's later testimony, however, Ms. Lacy did not know which of her savings accounts the funds for the certificates of deposit were coming from and she did not read any of the documents she signed. Ms. Lacy died two or three months later, without having changed her will.

In the ensuing dispute between Ms. Fleming and the residuary devisee under Ms. Lacy's will over the $90,000 that had been withdrawn from the savings account, Mr. Church testified that the transfer of funds from the savings account to the certificate of deposit was initiated at his direction for the sole purpose of earning a higher rate of return on the invested funds (i.e., that Ms. Lacy did not intend to reduce the specific bequest to Ms. Fleming). The trial court held the bequest to Ms. Fleming was of the "the funds" in the account, rather than the account itself, and that Ms. Fleming therefore was entitled to the $90,000. In reversing the trial court's judgment, the court of appeals "reluctantly" agreed with the residuary devisee that extrinsic evidence with respect to Ms. Lacy's intent concerning the specific bequest to Ms. Fleming was not admissible. Citing the Supreme Court's decision in *Domo v. McCarthy*,[22] the court stated: "[W]hen the language of the will is clear and unambiguous, the testator's intent must be ascertained from the express terms of the will itself. . .Only when the express language of the will creates doubt as to its meaning may the court consider extrinsic evidence to determine the testator's intent."[23] Accordingly, Ms. Fleming received only the funds remaining in the savings account at Ms. Lacy's death (about $4,100), and the $90,000 certificate of deposit passed to the residuary taker under the will.

Acknowledging that its holding likely defeated Ms. Lacy's intent for the $90,000, the opinion explained the court's decision:

> We admit that it is tempting in this case to substitute our interpretation of the testator's intent for the clear language of the will. . .However, we believe courts begin a treacherous descent upon a slippery slope when they start substituting their judgment in place of the express language of a will. The fact that the result in this case seems inequitable does not negate the potentially greater injury to jurisprudence were we to defer to our hearts rather than our minds.
>
> Although this result may be inequitable, it is the only possible legal result given the record as it exists before us now. The express terms of the will are unambiguous. It is only by introducing the extrinsic evidence of the substantial transfer of funds on the day the will was executed that testator's intent may appear unclear. However, our independent examination of the will discloses no basis upon which to justify a consideration of the extrinsic evidence admitted by the lower court. This is especially true in light of the continued existence of [the savings account, the funds of which were bequeathed to Ms. Fleming] at the time of death.[24]

If the facts in *Church* occurred today, except that Ms. Lacy had used a revocable trust for the disposition of her property instead of a will (or if she had used a will and the reformation doctrine of R.C. § 5804.15 had been extended by the courts or legislature to wills), an interesting question is whether the inequitable result in *Church* would be avoided by reformation. Although it is difficult to answer that question with certainty, it appears the most likely answer is "no." The hypothetical revocable trust instrument or will would have accurately stated her intent - to devise the savings account to Ms. Fleming - when it was executed. Ms. Lacy's mistake was withdrawing the $90,000 from the savings account without making an appropriate change to her will. In the language of the Restatement, reformation is not available "to compensate for [post-execution] changes in circumstances," or "to correct a failure to prepare and execute a document."[25] Further, the mistake "did not relate to facts that existed when the will was executed."[26]

On the other hand, that conclusion would leave unchanged the admittedly inequitable result in *Church*, even if the intent-furthering, remedial reformation doctrine had been applicable. Perhaps a successful argument could be made that Ms. Lacy's actual specific intent when she executed her will was for Ms. Fleming to receive the $94,000 in the savings account, and that the will was simply not properly drafted to reflect her intent because it did not address the contingency of the funds being subsequently moved to another account.[27] That argument, though, isn't as straight forward as it may seem. If Ms. Lacy had intended Ms. Fleming to receive something other than whatever funds were in the specified savings account when she died, exactly what was her intent? If she intended a bequest of $94,000, she easily could have so provided. If she intended Ms. Fleming to receive the savings account funds even if they had been withdrawn from the specified account, what exactly was her intent with respect to possible withdrawals from the account? For example, what if she had withdrawn part or all of the funds from the account and combined them with other funds in a different account, or invested part or all of the withdrawn funds in stocks, bonds, or real estate, perhaps with other funds of hers, or spent part or all of the withdrawn funds? Again, the mistake in *Church* does not appear to have been with respect to the testator's specific intent at the time the will was executed, but rather caused by subsequent events (the withdrawal) and a failure to revise her will accordingly.

ABANDONING THE DISTINCTION BETWEEN PATENT AND LATENT AMBIGUITIES

With respect to Ohio's differing rules for wills with patent, as opposed to latent, ambiguities, there is substantial recent authority for abandoning the distinction between the two kinds of ambiguities in determining whether extrinsic evidence is admissible to interpret a will. For example, the Restatement (Third) of Property allows extrinsic evidence to resolve patent as well as latent ambiguities,[28] and a number of courts in other jurisdictions have done the same in recent years.[29]

IS A WILL OR TRUST INSTRUMENT AMBIGUOUS?

Regardless of whether either or both of these two

modern trends - allowing the reformation of unambiguous wills (regardless of whether the mistaken terms relate to a testamentary trust) and abandoning the distinction between patent and latent ambiguities - is adopted in Ohio, it will remain important to determine whether a will or trust instrument is ambiguous. As stated above, under current law, if a non-testamentary trust will provision is unambiguous, extrinsic evidence of the testator's intent is not admissible. If Ohio law is changed to allow a mistake in an unambiguous will to be corrected by reformation (without regard to whether the mistake relates to a testamentary trust), clear and convincing evidence of the mistake and of the testator's true intent will be required to reform the will (just as it is to reform the terms of an unambiguous trust instrument under R.C. § 5804.15). By contrast, if a will or trust instrument is ambiguous, the evidentiary standard for resolving the ambiguity is the lower preponderance of the evidence standard.[30]

Thus, what constitutes an "ambiguity," and whether one is present with respect to a particular will or trust instrument, are important questions, and they are not always easy to answer.[31] A 1961 case decided by the Wisconsin Supreme Court is illustrative.[32] The key facts were that (i) the testator's will included a devise "to Robert J. Krause, now of 4708 North 46th Street, Milwaukee, Wisconsin;" (ii) when the testator executed the will and at the testator's death, there was a Robert J. Krause living at that address; (iii) the testator did not know Robert J. Krause who lived at that address; and (iv) the testator knew a Robert W. Krause, who was a former employee and friend whom the testator had named as a devisee in earlier wills. After expressly stating that "[t]here is no ambiguity" in the will, and acknowledging the traditional rule that in the absence of an ambiguity, extrinsic evidence of the testator's intent is inadmissible, the Wisconsin Supreme Court nevertheless held for the former employee and friend by creating an exception to the plain meaning rule for "details of identification," such as "middle initials, street addresses, and the like."[33] The Restatement agrees with the result in the case, but unlike the Wisconsin Supreme Court, views the case as one involving a latent ambiguity: "Although the text of the devise is not ambiguous on its face, the extrinsic evidence reveals a latent ambiguity—the description of the devisee does not precisely fit any person [the testator] knew or knew of, although it does fit an existing person."[34]

CONCLUSION

Extending the trust reformation doctrine of R.C. § 5804.15 to wills generally (without limiting it to testamentary trust provisions of wills) would unify Ohio law on interpreting trust instruments and wills. As discussed above, doing so also would be consistent with recent changes to the Uniform Probate Code and the Restatement (Third) of Property: Wills and Other Donative Transfers, and recent legislative and case law developments in a number of other states. Further, it would prevent the unjust enrichment that otherwise would result for the unintended beneficiaries of the testator's mistake. Moreover, the reformation doctrine's clear and convincing evidence standard would reduce, if not eliminate, concerns over the reliability of the evidence of mistake and accurately implementing the testator's intent. As illustrated by the discussions above of the scope of the reformation doctrine and the *Church* case, however, adopting a general wills reformation doctrine would not ensure that a testator's intent at death was given effect, and it would introduce some uncertainty regarding what mistakes in unambiguous wills could be corrected.

ENDNOTES:

[1]32 Ohio Jur. 3d § 556.

[2]See In re Estate of Cole, 621 N.W.2d 816 (Minn. App. 2001).

[3]32 Ohio Jur. 3d § 555.

[4]Restatement (Third) of Property: Wills and Other Donative Transfers, § 11.1, cmt. c.

[5]32 Ohio Jur. 3d § 554.

[6]Id. at § 556.

[7]Id. at § 555.

[8]As noted by the comment to the analogous provision of the Uniform Trust Code (the "UTC"), § 415, "[b]ecause reformation may involve the addition of language to the instrument, or the deletion of language that may appear clear on its face, reliance on extrinsic evidence is essential." UTC § 415, cmt.

[9]See Domo v. McCarthy, 612 N.E.2d 706, 708 (Ohio 1993); Daloia v. Franciscan Health Sys. of Cent. Ohio, Inc., 679 N.E.2d 1084, 1089 (1997).

[10]The explanation for the conclusion that R.C. § 5804.15 likely applies to testamentary as well as inter vivos trusts is that: (i) R.C. § 5804.15 does not limit its applicability to inter vivos trusts; (ii) under R.C. § 5801.02, the OTC is applicable to testamentary trusts to the extent provided by R.C. § 2109.69; (iii) under R.C. § 2109.69, the OTC applies to testamentary trusts "except to the extent that any provision [of the OTC] conflicts with any provision of Chapter 2109. . ., or with any other provision of the Revised Code, that applies specifically to testamentary trusts and except to the extent that any provision of [the OTC] is clearly inapplicable to testamentary trusts;" and (iv) it does not appear that R.C. § 5804.15 conflicts with any provision of Chapter 2109, or with any other provision of the Revised Code, or that it is "clearly inapplicable to testamentary trusts."

[11]See 32 Ohio Jur. 3d § 554.

[12]Reforming unambiguous wills to correct mistakes proven by clear and convincing evidence is not a new idea. See generally, John H. Langbein and Lawrence W. Waggoner, Reformation of Wills on the Ground of Mistake: Change of Direction in American Law? (1982) 130 U.PA. L.REV. 521 (1982).

[13]See Unif. Prob. Code § 2-805.

[14]Colorado (Colo.Rev.Stat. § 15-11-806); Florida (Fla.Stat. § 732.615); Massachusetts (M.G.L.A. 203E § 415); New Mexico (N.M.Stat.Ann. § 45-2-805); North Dakota (N.D. Cent.Code § 30.1-10-05); South Carolina (So. Car. Probate Code § 62-7-415); and Utah (Utah Code Ann. § 75-2-805). See also Wash. Rev. Code § 11.96A.125 (non-UPC statute allowing reformation of unambiguous wills if evidence of mistake is clear and convincing).

[15]See Restatement (Third) of Property: Wills and Other Donative Transfers, § 12.1.

[16]See In re Estate of Duke, 352 P.3d 863 (Cal. 2015); In re Estate of Herceg, 747 N.Y.S.2d 901 (Sur. 2002). Note, however, that prior to the Massachusetts legislature's enactment of the UPC's wills reformation statute, M.G.L.A. 203E § 415, the Massachusetts Supreme Judicial Court expressly declined to adopt the wills reformation doctrine. See Flannery v. McNamara, 738 N.E.2d 739 (Mass. 2000).

[17]Restatement (Third) of Property: Wills and Other Donative Transfers, § 12.1 cmt. h.

[18]352 P.3d 863 (Cal. 2015).

[19]Id. at 897-98.

[20]Id. at 897.

[21]685 N.E.2d 809 (Ohio App. 1996).

[22]612 N.E.2d 706 (Ohio 1993).

[23]Church v. Morgan, 685 N.E.2d 809, 811 (Ohio App. 1996). (Footnotes omitted.)

[24]Id. at 812.

[25]Restatement (Third) of Property: Wills and Other Donative Transfers, § 12.1 cmt. h.

[26]Id. at illus. 3.

[27]An alternative approach to avoiding the intent-defeating, inequitable result in Church would have been to characterize the withdrawal of funds from the savings account and purchase of the certificate of deposit as a mere change in form, not substance, to avoid the partial ademption of Ms. Fleming's devise. See Ruby v. Ruby, 973 N.E.2d 361 (Ill. App. 2102); In re Estate of Geary, 275 S.W.3d 835 (Tenn. App. 2008).

[28]See Restatement (Third) of Property: Wills and Other Donative Transfers, § 11.2. See also id., § 11.1 cmt. a ("Although it is customary to distinguish between latent and patent ambiguities, no legal consequences attach to the distinction.").

[29]See, e.g., In re Estate of Russell, 444 P.2d 353 (Cal. 1968); In re Estate of Cole, 621 N.W.2d 816 (Minn. App. 2001); Succession of Neff, 716 So.2d 410 (La. App. 1998); In re Estate of Brown, 922 S.W.2d 605 (Tx. App. 1996); Univ. of S. Ind. Found. v. Baker, 843 N.E.2d 528 (Ind. 2006); and In re Lock Revocable Living Trust, 123 P.3d 1241 (Haw. 2005).

[30]See Restatement (Third) of Property: Wills and Other Donative Transfers, § 11.2(a). A comment to the Restatement's reformation rule explains: "The important difference between [resolving ambiguities and correcting mistakes] is the burden of proof. Ambiguity [which is subject to the preponderance of the evidence standard] shows that the donative document contains an inadequate expression of the donor's intention. [For reformation], because there is no ambiguity, clear and convincing evidence is required to establish that the document does not adequately express intention." Id. at § 12.1 cmt. c. See also id. cmt. e.

[31]The Restatement's definition of an "ambiguity" is: "An ambiguity in a donative document is an uncertainty in meaning that is revealed by the text or by extrinsic evidence other than direct evidence of intention contradicting the plain meaning of the text." Id. at § 11.1. If the extrinsic evidence is "direct evidence of intention contradicting the plain meaning of the text," the issue is one of mistake, not ambiguity.

[32]In re Gibbs Estate, 111 N.W.2d 413 (Wis. 1961).

[33]Id.

[34]See Restatement (Third) of Property: Wills and Other Donative Transfers, § 11.2 cmt. j, illus. 8.

WHEN THE CLAIMS PERIOD IS A FULL FOUR YEARS

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We all know that the nonclaim statute requires claims against the assets of the probate estate to be presented to an executor or administrator within six months after death, RC 2117.06. But did you know that claims may be presented against other (that is, nonprobate) assets within the extended period of four years after death? The purpose of our short probate claims period is to facilitate closing of probate estates. Apparently there is no similar policy to facilitate distribution of other assets, including revocable trusts, TOD, POD, joint and survivorship, beneficiary designated assets and the like. Recipients of these nonprobate assets, beware! Worse, are holders of these assets such as trustees, banks and other financial institutions encouraged to deny them to beneficiaries for four years to avoid a potential required second payment to claimants?

How did we get there? Two developments, not necessarily recent, have got us in this mess. The first is the undermining of the holding in *Schofield v. Cleveland Trust Company*, 135 Ohio St. 328 (1939). The second is enactment of creditor rights statutes.

Schofield. We all know that *Schofield* held that claims against a settlor cannot be asserted after death against his or her revocable trust. What we miss is that the holding was squarely based on a statute that has since been repealed by enactment of the Ohio Trust Code in 2007. The statute relied on in *Schofield* was then General Code 8617, and the court not only cited it but copied it in full in its opinion, as follows (emphasis added by PLJO):

> All deeds of gifts and conveyance of real or personal property made in trust for the exclusive use of the person or persons making the same shall be void and of no effect, but the creator of a trust may reserve to himself any use or power, beneficial or in trust, which he might lawfully grant to another, including the power to alter, amend or revoke such trust, and such trust shall be valid as to all persons, except that any beneficial interest reserved to such creator shall be subject to be reached by the creditors of such creator, and except that where the creator of such trust reserves to himself for his own benefit a power of revocation, a court of equity, at the suit of any creditor or creditors of the creator, may compel the exercise of such power of revocation so reserved, to the same extent and under the same conditions that such creator could have exercised the same.

The statute became RC 1335.01 when our statutes were recodified in 1953. When the Ohio Trust Code was enacted in 2007, the statute was repealed as its general purpose of subjecting revocable trusts to creditors was duplicated by the uniform law adopted as RC 5805.06. That present statute does not contain the clause of GC 8617 emphasized above, which was the clause on which *Schofield* relied. *Schofield* held that since under the old statute the power of revocation expired with the settlor, his creditors could not reach the trust after its (and his) expiration. The present statute contains nothing on which to hang that holding, so that *Schofield* has been unsupported by its statute since 2007.

For further details see Krall and Mesnard, Legal Uncertainty with Respect to Creditor Claims against Non-Probate Assets, 24 PLJO 322 (May/June 2014). In addition, we do not have and never had a similar statute shielding other nonprobate assets (TOD, POD, joint and survivorship, beneficiary designated, etc.) from claims after death of the owner. Finally, our Courts of Appeals have questioned whether as a matter of good legal policy *Schofield* is still good law; for details see Ogline, Watterson v. Burnard: Is Schofield Still Relevant? 23 PLJO 200 (May/June 2013); Spinazze et al., Watterson v. Burnard: Hard Facts Make Bad Law, 23 PLJO 272 (July/Aug 2013); Ogline, Sowers v. Luginbill: A Chink in the Schofield Armor? 19 PLJO 15 (Sept/Oct 2008); Ogline, Update on Sowers v. Luginbill, 19 PLJO 83 (Nov/Dec 2008). A list of pre-2010 materials on this issue is at 21 PLJO 101 (Nov/Dec 2010).

Uniform Fraudulent Transfer Act. The Uniform Fraudulent Transfer Act was enacted in Ohio in 1990 as RC Chapter 1336. It replaced the older Uniform Fraudulent Conveyance Act enacted in 1961 also as RC Chapter 1336. *Schofield* was decided before either statute had been enacted. The

Schofield court noted that the old Oho case law on fraudulent transfers that preceded these statutes had not been invoked in that case, but stated (in dicta) that it could apply to such claims. UFTA states that it applies when there has been a lifetime transfer without consideration that renders the transferor insolvent, RC 1336.05; and the transfer is deemed to occur at death when it becomes irrevocable, RC 1336.06. Thus, UFTA applies if the trust has been funded and the probate estate is therefore insolvent, which is quite often the case now (if the trust is not funded or if the probate estate is solvent, issues of creditor access to nonprobate assets should be moot). The UFTA statute of limitations is four years from the transfer, that is, from when the trust funding becomes irrevocable on the death of the settlor, RC 1336.09. UFTA makes no reference to probate claims procedures, and is quite independent of them; thus, it is not necessary for a creditor to present his claim to an executor or administrator or to obtain its allowance before proceeding under UFTA.

What authority (in addition to UFTA's express provisions) do we have for applying UFTA to claims post-death? The first and best authority is *Schofield* itself, where the court stated (in dicta) that fraudulent conveyance law could apply. Quite recently in *Administrator, State of Ohio Medicaid Estate Recovery Program v. Miracle*, 2015-Ohio-1516 (4th Dist.), an Ohio Court of Appeals applied UFTA to the State's Medicaid claim. There is also the celebrated case *Rush University Medical Center v. Sessions*, 2011 Ill. App. 101136, involving a $1.5 million charitable pledge, revocable trust and insolvent probate estate, analyzed in Vannatta, Creditor Claims at Death and Nonprobate Assets: Never the Two Shall Meet? 22 PLJO 70 (Nov/Dec 2011). These cases both applied UFTA to revocable trusts, but there is no legal barrier to applying it to other nonprobate assets as well.

Consider the policy (if any) that appears here to frustrate the public in its avoidance of probate by encouraging trustees, banks and other financial institutions to sit on nonprobate assets for four years after death before releasing them to the beneficiaries. It is also a policy that encourages creditors to ignore the probate claims system and go direct against stakeholders and beneficiaries. Do we really intend to attempt to drive our citizens back into the probate system to avoid a four year wait for their inheritances? Are they willing to be driven?

We can avoid these issues by careful drafting of the trust instrument. Many revocable trust agreement forms provide specifically for claims against the probate estate to be paid from the trust assets. In such cases, the probate estate is not insolvent, probate creditors are paid from trust assets and the problems identified in this article do not occur. For example, see the author's form in the Ohio Trust Code Manual, OSBA-CLE Reference Manual 14-157 at 8.21. In *Zahn v. Nelson*, 2007-Ohio-667 (4th Dist.), where the trust instrument contained such a provision and the probate estate was insolvent, the court required the trustee to pay the statutory support allowance to the widow; the couple was divorcing when the husband died, and he had provided in his will and trust for only his children. The trust instrument also provided for the payment if the executor "may require" it, and the court held that the executor had a fiduciary duty to require it. Thus, the case may establish that even where either or both of the executor and trustee are only granted discretion to pay claims from the trust, if the probate estate is insolvent both have a fiduciary duty to creditors to request and make the payment. However, not all trust instruments will contain such provisions, mandatory or discretionary.

We can wait years for our courts to sort all this out case by case; or we can enact a statute that fixes it for everyone now. Such a statute is at hand, drafted by the Uniform Laws Commission and enacted by almost all other states in either its uniform version or in a homemade version. It is codified as Uniform Probate Code 6-102. See Wellman, Rights of Decedents' Creditors Against Nonprobate Transfers at Death, 8 PLJO 21 (Nov/Dec 1997). A version of it edited to Ohio requirements has been under study by the EPTPL Section of OSBA for almost fifteen years; see Hoffheimer and Shapiro, Expanding the Rights of Creditors to Nonprobate Property: A Sensible Proposal to Close Ohio's Antiquated Loopholes, 13 PLJO 21 (Nov/Dec 2002). The proposed statute would require that claims first be presented and allowed through the

probate system, and if the probate estate was insolvent, remaining claims could then be asserted against nonprobate assets subject to more reasonable time limits; and more important perhaps, it would permit trustees and others without notice of the claims and insolvency promptly to distribute nonprobate assets and pass the claims liability through to the beneficiaries.

The author believes strongly that we need such a statute, and has been chairman of the EPTPL Section committee considering (and urging) it. If you agree, please send your helpful comments to the author, to Roy Krall of Akron who is the current Chairman of the Section or to any member of the EPTPL Section Council.

Meanwhile, what to do under existing law? The author offers this advice:

1. Do not rely on the probate claims system, it is obsolete. Most probate estates are insolvent because their expected assets do not pass through the probate system. The few probate assets are more than exceeded by priority claims such as funeral bills and the support allowance, leaving nothing for general creditors.

2. Don't attempt to stiff creditors who are thus shut out of the probate system. Advise clients to pay them from the nonprobate assets, whether or not there is an executor or administrator and whether or not the claims are presented and allowed, and with multiple beneficiaries equalize their burdens by private accountings. This is the claims process equivalent of informal probate as under the Uniform Probate Code or homemade law of almost all other states.

3. If there is a claim that your client would have disallowed if it had passed through the probate system, refuse to pay it and require the creditor to establish it by suing one or more transferors or beneficiaries under UFTA. With the over-generous four year statute of limitations on that suit, your clients should probably keep a reserve against any liability that may be determined in it.

CASE SUMMARIES

Huntington National Bank v. Riversource Life Ins. Co.

Headnote: Gifts

Citation: 2015-Ohio-5600 (7th Dist.)

During life decedent gave her oil and gas lease interest to defendant, her cousin who held her power of attorney. Decedent signed a formal deed for it, after reading and discussing it with the notary (who knew her) and others (including defendant) then present. After her death the bank as trustee of her trust challenged the gift, because defendant was her agent and because she was then age 101 (she died at age 102). The appellate court reversed the probate court and held this was insufficient evidence to avoid the gift. The case suggests how successfully to effect such a gift in what appears on the surface as a difficult situation.

In re Estate of Distelhorst

Headnote: Inventory

Citation: 2016-Ohio-413 (4th Dist.)

Estate passed by will to decedent's son, who was also her sole heir and was appointed as executor. He filed an inventory that was approved upon filing, without notice or hearing. The filing was discovered by the children of her predeceased household partner, who filed exceptions to the inventory contesting ownership of various household items. The probate court held a hearing on the exceptions and overruled them on their merits, but the appellate court directed further consideration of some of them. No action was taken to vacate approval of the inventory. Your editor suggests that vacating approval of the inventory was not necessary because it could not bind the exceptors, since they were not given notice of or made parties to any hearing on it. Further, it may be argued that the common practice of approval of inventories without notice or hearing renders them worthless documents effective only as against the fiduciary filing them.

Newcomer v. Roan

Headnote: Trust Administration and Termination

Citation: 2016-Ohio-541 (6th Dist.)

This case contested disposition of a substantial block of stock of Spangler Candy Company, an Ohio family-owned company. Decedent's dispositive revocable trust provided lifetime trust interests to her children. Decedent later lived part time in Flor-

ida, and in 2003 her trust was restated by a Florida lawyer to give her children their shares outright. In 2006 it was further amended by her Ohio lawyer, but he did not know and was not told of the 2003 restatement; he made other changes and "restated and reaffirmed" the pre-2003 version that left the shares of the children in trust. The issue here was whether the 2006 amendment was "boilerplate' or was actually intended to revive the pre-2003 version. The trial court held that it was ambiguous, and resolved the ambiguity in favor of the 2003 version based in part on the testimony of the Ohio lawyer who stated that the 2006 amendment was not intended to change the dispositive provisions; the appellate court affirmed.

A related issue was a provision for equalization of company shares of decedent's two children. The issue was whether equalization was to be based on all shares held by each, or on only those shares received from decedent. The trial court limited equalization to shares received from decedent, but the appellate court held that shares received from all other sources were also intended to be considered.

In re Estate of Bohl

Headnote: Claims

Citation: 2016-Ohio-63(12th Dist.)

Decedent's only asset was a farm, operated by her son. Her will left the farm to her four children. She had little income, and at her death the son filed claim under for reimbursement from her estate (that is, the farm) of his payment of her medical bills and of farm real estate taxes, insurance and maintenance expenses. A daughter (there were four children) also filed claim for reimbursement from the estate of her payment of their mother's home caregiver. Lastly, the son later amended his claim to add other home caregiver expenses paid by him but omitted from his original claim.

The probate court allowed some of the claims as established by clear and convincing evidence of an oral contract, overcoming the presumption otherwise for claims within the family. However, it denied the claim of farm real estate taxes, insurance and maintenance expenses for lack of a written contract, and denied the son's additional claim for home caregiver expenses as untimely under RC 2117.02 (the son was the executor so filing under that special statute was required). The appellate court held that a written contract was not required for any of the claims, and remanded those claims so denied for further consideration. It otherwise affirmed the probate court.

Perkins v. Rieser

Headnote: Standing

Citation: 2016-Ohio-728 (2d Dist.)

Decedent left three children, and apparently all of her assets were left in a revocable trust for them. One daughter sued the others over the trust, the matter was settled, the settlement agreement released all claims of all parties and the court granted final judgment accordingly. That daughter then probated the will, was appointed executor and as executor sued again over the trust, arguing that her suit was not barred by the earlier settlement agreement and final order in the trust case because she was a party to it only individually (she had not yet then been appointed as executor). The trial court held the daughter individually was the real party in interest in the suit as executor, dismissed it and even ordered sanctions against the daughter. Affirmed on appeal.

This is yet another example of treating a fiduciary as two persons, one himself or herself individually and the other as fiduciary. If this is the law, when and how did it become law? It is not the common law of England that we inherited. Would the correct approach here have been that the daughter was only that, a person (with one head and body, not two) , who was a party to the settlement and thus bound by it, period?

Fried v. Abraitis

Headnote: Standing

Citation: 2016-Ohio-934 (8th Dist.)

It appeared that a half million dollar investment account was missing from the inventory in this estate, and the probate court on its own motion

removed the executor and appointed a neutral attorney as successor administrator. That successor sued the former executor for concealment of the account, and moved to disqualify his attorney who represented him in administering the estate from representing him in the concealment action. The claim was that the attorney had represented the estate and had a conflict in now representing a client adverse to the estate. The trial court granted the motion, but the appellate court reversed. The attorney did not represent the estate, he represented an individual who was then executor of the estate, and could continue to represent that individual after his removal in defending the concealment action against him. Cited was RC 2109.03, authorizing a fiduciary to retain counsel in matters relating to the estate.

Your editor argues that this has it right. See however the potentially contrary ruling, that the fiduciary is two persons, one individually and the other as fiduciary so that the attorney might represent only the fiduciary person, in *Perkins v. Rieser*, the immediately preceding case.

SUBJECT INDEX

(Rolling 12-month index covering March 2015 to February 2016)

Unauthorized Practice of Law

Ohio State Bar Assn. v. Wishgard LLC, 2015-Ohio-4309, Nov/Dec 2015

Wills and Contests

Fried, Ethical Issues With Clients Who Exhibit Diminished Capacity, March/April 2015

Demeraski v. Bailey, 2015-Ohio-2162, July/Aug 2015

Kolb, How to Identify and Prove Undue Influence, July/Aug 2015

Sferra v. Shepherd, 2015-Ohio-2902, Sept/Oct 2015

LEGISLATIVE SCORECARD

Keep this Scorecard as a supplement to your 2014 Ohio Probate Code (complete to May 6, 2014) for up-to-date information on probate and trust legislation.

Recently enacted		
Conform Ohio tax law to federal tax law	HB 19	Eff. 4-1-15
Conform executor fee to repeal of Ohio estate tax See Dauterman, *Technical Corrections Proposed for Ohio Executor Fee Statute*, 24 PLJO 177 (Jan/Feb 2014); also 25 PLJO 237 (July/Aug 2015).	HB 64	Eff. 6-30-15
Waiver of first partial account clarified	HB 64	Eff. 6-30-15
Watercraft trailer passing to spouse See Thakur, *Proposal Authorizing Transfer of a Boat Trailer to a Surviving Spouse (Along with the Boat and Motor)*, 24 PLJO 146 (Nov/Dec 2013); also 25 PLJO 240 (July/Aug 2015).	HB 64	Eff. 6-30-15
Conform Ohio tax law to federal tax law	SB 2	Passed 1-27-16, to Governor
Pending		
Adopt MOLST (medical order life sustaining treatment) forms See Maag, *The Development of POLST to Honor Medical Treatment Goals at End-of-Life*, 23 PLJO 13 (Sept/Oct 2012).	SB 165	Intro. 5-18-15
Adopt Ohio Family Trust Company Act See Galloway, *Proposed Ohio Legislation Would Enable Use of Private Trust Companies*, 26 PLJO 33 (Nov/Dec 2015)	HB 229 SB 175	Passed House 12-9-15 Passed Senate 4-20-16
Effect of divorce on TOD real estate	SB 232	Passed Senate 4-12-16
Omnibus probate bill (see OSBA legislation list)	HB 432	Reported by House committee 4-13-16
Proposed legislation sponsored by the Ohio State Bar Ass'n, Estate Planning, Trust and Probate Law Section		
Permit waivers of inventories and accounts		Ohio BAR of 10-17-94

See Johnson, *An Apologia for Voluntary Inventories and Accounts*, 8 PLJO 6 (Sept/Oct 1997); Brucken, *Non-Court Administration of Estates Now Available in Over Two-Thirds of the States,* 19 PLJO 68 (March/April 2002); Frederickson *The Inventory and Appraisal: Notice, No Notice or ("Gasp") No Inventory? That Is the Question,* 22 PLJO 161 (March/April 2012); *An Allegory* 19 PLJO 164 (March/April 2009); Schweller, *Waiver of Inventories and Accounts,* 23 PLJO 95 (Nov/Dec 2012).		
Strengthen estate tax apportionment act	HB 432	Fall 2005*
See Harris, *Estate Planning Trust and Probate Law Section Committee Supports Change to Apportionment of Estate Tax*, 16 PLJO 50 (Nov./Dec. 2005).		
See Vannatta, *A Call for Help to the Ohio General Assembly: The Ohio Estate Tax Apportionment Statute Needs Modification*, 19 PLJO 218 (July/Aug 2009).		
Facilitate deposit of wills with court	HB 432	Fall 2012*
See Ruchman, *Production of Wills*, 23 PLJO 48 (Nov/Dec 2012).		
Simplification of sale of real estate by guardians	HB 432	Spring 2013*
See Thakur, *Proposal: Authorizing the Sale of Real Property by a Guardian Through use of Consents*, 23 No. 5 Ohio Prob. L.J. NL 2 (May/June 2013).		
Effect of divorce on TOD real estate	SB 232	Spring 2013*
See Meredith, *Changes to the Transfer on Death Real Estate Statutes in the Event of Divorce, Dissolution or Annulment*, 23 No. 5 Ohio Prob. L.J. NL 3 (May/June 2013).		
Inheritance through artificial reproduction technology		Spring 2013*
See Rectenwald, *The Inheritance Rights of "ART" Children*, 23 No. 5 Ohio Prob. L.J. NL 4 (May/June 2013).		
Authorize arbitration of trust disputes		Spring 2014*
See Clark, *Required Arbitration of Trust Disputes: Enforcing Settlor's Intent*, 24 No. 6 Ohio Prob. L.J. NL 2 (Jul/Aug 2014).		
Residence in revocable trust qualifying for Medicaid		Fall 2014*
See Browning, *Recent Court Decision Punishes Family Who Titled Home in Revocable Trust*, 23 PLJO 207 (May/June 2013).		
Clarify Uniform Simultaneous Death Act	HB 432	Spring 2015*
See Davis and Haight, *Calling for Clarity in Ohio's Uniform Simultaneous Death Act*, 25 PLJO 181 (March/April 2015).		
Updating Ohio Trust Code	HB 432	Fall 2015*
See Brucken, *Ohio Trust Code Amendments Proposed*, 26 PLJO 35 (Nov/Dec 2015).		
Updating Ohio Uniform Principal and Income Act	HB 432	Fall 2015*
See Evans, *Changes to the Uniform Principal and Income Act Currently Under Consideration for Adoption in Ohio*, 24 PLJO 226 (March/April 2014).		
Permitting Deferral of UTMA gifts to age 25	HB 432	Fall 2015*

See Meehan, *Ohio Transfers to Minors Act: Should Distributions Be Delayed Beyond Age 21?* 25 PLJO 71 (Nov/Dec 2014).

*Full text and explanation given in EPTPL Section Report to OSBA Council of Delegates, posted on OSBA website under "Publications/Special Reports/Council of Delegates."

For the full text of pending bills and enacted laws, and for bill analyses and fiscal notes of the Legislative Service Commission, see the Web site of the General Assembly: http://www.legislature.state.oh.us/search.cfm. Information may also be obtained from the West Ohio Legislative Service, and from our Customer Service Department at 800-362-4500. Copies of legislation prior to publication in OLS are available from Customer Service at nominal cost.

